83-558

No. 83-____

Office-Supreme Court, U.S.
FILED
OCT 3 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether "medical treatment" such as clean intermittent catheterization is a "related service" required under the Education for All Handicapped Children Act and, therefore, required to be provided to the minor Respondent.

2. Is a public school required to provide and perform the medical treatment prescribed by the physician of a handicapped child by the Education of All Handicapped Children Act or the Rehabilitation Act of 1973?

3. Whether the Fifth Circuit Court of Appeals misconstrued the opinions of this Court in *Southeastern Community College* v. *Davis*, *Pennhurst State School & Hospital* v. *Halderman*, and *State Board of Education* v. *Rowley*.

TABLE OF PARTIES BELOW

This Petition is submitted on behalf of the Irving Independent School District and its Board of Trustees. The parties below are as follows:

HENRI AND MARY TATRO, Individually and as Next Friend of Amber Tatro, a Minor,

Plaintiffs-Appellees Cross-Appellants

THE STATE OF TEXAS, TEXAS EDUCATION AGENCY,

Defendants

STATE BOARD OF EDUCATION AND ITS MEMBERS: Elizabeth Armstrong, James M. Binion, Joe Kelly Butler, W. W. Carter, Don H. Cook, Brian Crouch, Jimmy L. Elrod, W. H. Fetter, Wayne Frederick, Joseph C. Gathe, E. R. Gregg, Jr., Rubin E. Hinojosa, Jim Hollingsworth, William N. Kemp, Mary Ann Leveridge, Paul Matthews, Rex Reddell, William P. Sarsgard, Richard Tencinte, Laura Tynes, Marjory Vickery, James H. Whiteside; ALTON BOWEN, COMMISSIONER OF EDUCATION,

Defendants-Appellants

THE IRVING INDEPENDENT SCHOOL DISTRICT, ITS BOARD OF TRUSTEES: Roger Hill, Robert Pierce (no longer on Board), Anne Pfaff, Vickie Tatum, Troy Kelley, Pat Norman, John Stipes; James W. Fillbeck has now replaced Robert Pierce on the Board,

Defendants-Appellants Cross-Appellees

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IN THE

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OCTOBER TERM, 1983

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IRVING INDEPENDENT SCHOOL DISTRICT,
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HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Irving Independent School District and its Board of Trustees, John Stipes, Roger Hill, Pat Norman, Vickie Tatum, Troy W. Kelley, Anne Pfaff, and James W. Filbeck, hereby petition that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 25, 1983.

I. OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals is reported at 703 F.2d 823 and is printed in the Appendix hereto at pages 64a to 83a. The Opinion of the Federal District Court for the Northern District of Texas is reported at 516 F.Supp. 968 and is printed in the Appendix hereto at pages 1a to

36a. The Opinion below is the second Opinion is this case. The first Opinion of the Court of Appeals (hereafter *Tatro I*) is reported at 625 F.2d 557 (1980) and is printed in the Appendix hereto at 94a to 109a. The Opinion of the District Court in *Tatro I* is reported at 481 F.Supp. 1224 (1973) and is printed in the Appendix hereto at pages 86a to 93a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1983. A timely Motion for Rehearing and Suggestion for Rehearing En Banc was denied on July 5, 1983; and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III. STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory provisions relevant to this petition are set forth verbatim in the Appendix hereto:

The Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (1976):

Section 1401-Definitions
Section 1415-Procedural Safeguards

The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.:

Section 794, 794a

State Statutes:

Article 4495(b) § 3.06(d)(1),
Tex.Rev.Civ.Stat.Ann.
(Vernon Supp. 1982-83)

IV. STATEMENT OF THE CASE

In early 1979, when the minor Respondent was 3½ years old, her mother asked the Irving Independent School District to provide special education for her. The District agreed, and in a series of meetings developed an Individual Education Program ("IEP") for the child. The IEP did not provide for clean intermittent catheterization ("C.I.C."), which procedure was stipulated by the parties and subsequently found by the District Court to be medical treatment requiring a valid prescription of a physician and other physician's services. The School District maintained that since C.I.C. was medical treatment, it had no legal obligation to provide for nor administer C.I.C..

The parents pursued an administrative appeal through the Texas State Board of Education, which agreed with the School District's decision, holding that the child's IEP met with the standards of the State Education Agency and complied with applicable statutes and regulations.

The parents then brought an action in the Federal District Court for the Northern District of Texas basing their claims upon the Education for All Handicapped Children Act (EAHCA); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Civil Rights Act, 42 U.S.C. § 1983, requesting both monetary and injunctive relief.

The District Court denied the application for preliminary injunction to require the School District to provide C.I.C., holding that C.I.C. was not a related service within the meaning of the EAHCA because the need for it did not arise from the effort to educate and that the Plaintiffs could not convert a statute prohibiting discrimination in certain governmental programs [Section 504] to a statute requiring, in essence, the setting up of governmental health care for people seeking to partici-

pate in such programs. App. p. 92a. On original submission, the Court of Appeals for the Fifth Circuit, on assumed facts, remanded for trial determining that, on the assumed facts, failure to provide C.I.C. violated both the EAHCA and Section 504 of the Rehabilitation Act. *Tatro* v. *Texas*, 625 F.2d 557 (5th Cir. 1980) App. p. 92a.

On remand, the District Court, feeling constrained by *Tatro I* App. p. 94a, ordered Petitioner to modify the child's IEP to include provisions for C.I.C. in accordance with and as prescribed by a valid medical prescription provided by the child. Although the Court believed that *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981), reinforced its doubts that § 504 required C.I.C., it felt sufficiently constrained by *Tatro I* App. p. 31a, and without finding a specific violation of § 504, awarded attorneys fees pursuant to 29 U.S.C. § 794a(b).

All parties appealed; and the 5th Circuit Court of Appeals, relying heavily on "law of the case doctrine," affirmed. The panel decision reflects that were the panel "writing on a clean slate, we would share the district court's reluctance to read a statute designed to aid education to require provision of medical necessities of life which are required by a child whether or not she participates in the state's education program." App. p. 67a. The panel further found that although *Pennhurst* reinforced the District Court's doubts that Section 504 required C.I.C., it concluded that the Supreme Court had not spoken with sufficient clarity in *Pennhurst* to allow the single panel to overrule the previous panel's decision in *Tatro I*.

Petitioners filed a timely Motion for Rehearing and Suggestion for Rehearing En Banc, which motions were

denied by order dated July, 1983. App. p. 84a. Petitioners now present this Application for Writ of Certiorari.

V. REASONS FOR GRANTING THE WRIT

A. This Case Presents Questions Of Great Public Importance Concerning The Scope Of "Noneducational" Services Required To Be Provided By State And Local Education Agencies Under The Education For All Handicapped Children Act Of 1975.

The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. (hereinafter called "the Act"), is a funding statute intended to assist the states in providing an education for handicapped children. The Act has been the subject of much litigation and has been described as "Delphic" by both lower courts. This Court, in *Board of Education* v. *Rowley*, ____ U.S. ____, 102 S.Ct. 3034 (1982), removed much of the ambiguity from the Act for the benefit of state and local education agencies, emphasizing that the Act was designed to assist handicapped children to benefit *educationally*. This Court further held that the requirement of a free appropriate public education (FAPE) is satisfied when the state provides personalized instruction with sufficient support services to permit the handicapped child to benefit *educationally* from that instruction. *Rowley*, *supra*, at 3048 (emphasis added). The critical question remaining which is of major public interest is the extent to which states are obligated to provide "support services" and whether such "support services" must relate to the effort to educate, the paramount issue being whether the Act requires state and local education agencies to provide "medical treatment" prescribed by the handicapped child's attending physician.

Petitioner recognizes that this Court denied certiorari in *Pennsylvania Department of Education* v. *Tokarcik*,

665 F.2d 443 (3rd Cir. 1981) cert. denied, ___ U.S. ___, 102 S.Ct. 3508, a case involving C.I.C.. However, the critical distinction between *Tokarcik* and this case is that in this case, the procedure C.I.C. was stipulated by the parties to be "medical treatment"; that it was the treatment of choice of most medical centers; that prescribing C.I.C. or other treatment of a neurogenic bladder is the sole responsibility of the treating physician; and that it is a medical function. The District Court further found that C.I.C. required more services from the physician than diagnostic and evaluation services in determining a handicapping condition and that absent a valid physician's prescription, providing C.I.C. would be unlawful in violation of the Texas Medical Practices Act. Tex.Rev.Civ.Stat.Ann., Art. 4495b § 3.06(d)(1) (Vernon Supp. 1982-83) App. p. 113a. The Court of Appeals failed to address the "medical treatment" question squarely and determined that since the procedure could be performed by persons other than licensed physicians without violating prohibitions against practicing medicine without a license, the procedure was a "related service" under the Act. 20 U.S.C. § 1401(17) (1976) App. p. 110a. Unfortunately, major questions of significant importance to the general public are left unanswered and elucidate the need for a definitive answer from this Court.

Does the opinion below require that any medical treatment prescribed by an attending physician be performed and paid for by the education agency if a general health hazard might result otherwise? Are schools required to secure the services of persons sufficiently trained to allow a treating physician to prescribe with a view toward prescription implementation by the school? Does the Act create "national health care" through the public school system and obligate the local systems to provide same at no cost to the parent? Concommitent to these questions of

national importance if the answer is affirmative is the significance of additional planning necessary to the implementation of such requirements. If states and local education agencies are required to provide medical treatment, budgeting on the local level is of nation-wide importance. The additional revenue necessary to provide for the treatment, the personnel necessary for implementation of same, and insurance necessary to guard against liability for potentially catastrophic losses must be considered. These additional funds can come only from the individual taxpayer. Certainly the states, the local education agencies, and the individual taxpayers are entitled to a definitive answer regarding whether or not this funding statute has created an affirmative obligation to provide "medical treatment" to handicapped students.

Under the Act, "related services" are defined as follows:

> "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

20 U.S.C. § 1401(17) App. p. 110a. In the first appeal of this case, the Court of Appeals, in what Petitioner believes is an advisory opinion, held that C.I.C. was a related service because it could be performed by persons other than licensed physicians. App.p, 105a. It is important to remember that at the time of the first opinion, the parties had not stipulated that the procedure was medical

treatment. The opinion of the Court of Appeals sought to be reviewed herein overlooks this stipulation and followed the first opinion under the "law of the case" doctrine. App. p. 67a. The decision in question states that the School District argued that C.I.C. could not be performed unless a physician is physically present to supervise and control the procedure. App. p. 69a. Such has never been the position of Petitioner. However, Petitioner does submit that C.I.C. is "medical treatment" as stipulated by the parties and that in order to be performed, more is required from the physician than diagnosis and evaluation. The District Court on remand of the first appeal found that when delegating prescribed medical treatment, the physician must:

(1) determine the needs and capabilities of the patient;

(2) determine the training, experience, and competence of the person who will be performing the prescribed treatment;

(3) assume the responsibility for supervision, training, and control of the unlicensed person performing the procedure;

(4) determine if the treament is being properly performed and is progressing without complication;

(5) monitor the patient's progress and perform the numerous physician duties discussed in Amicus Brief of Texas Medical Association reprinted as an appendix to the District Court's opinion on remand. 516 F.Supp. at 987 App. p. 37a.

Thus it is clear that extensive services of a licensed physician are required to administer the prescribed medical treatment and such treatment is not a related service as defined by the Act, nor is it a medical service as defined at 34 C.F.R. § 300.13(b)(4). Since the public school em-

ployee cannot administer the prescribed treatment without a valid physician's prescription and other services of a licensed physician, the public school employee is not a "qualified person" as contemplated in the definition of "school health services" at 34 C.F.R. § 300.13(b)10. The Court of Appeals held that a valid prescription and physician supervision were necessary, but still determined that the procedure was a related service. App. p. 72a. The issue is not whether certain medical treatment such as C.I.C. can be performed by persons other than physicians. The issue is whether the Act requires that medical treatment other than for diagnostic and evaluation purposes be provided by the funding recipient. The statutory definition certainly does not contemplate the provision of medical treatment; and Petitioner submits that if the implementing regulations require same, they run afoul of this Court's opinion in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 60 L.Ed.2d 980, 99 S.Ct. 2361 (1971).

Petitioner understands that medical treatment such as kidney dialysis is delegated to and performed by technicians and nurses. A literal interpretation of the opinion of the Court of Appeals would transform this obvious medical treatment into a related service because it can be prescribed and delegated by a physician. Certainly, the Act neither contemplates nor requires recipients of funds to assume such obligations and responsibilities. The next obvious question is whether the recipients (state and local education agencies) are required to provide the personnel and equipment necessary to implement the medical treatment prescribed. Since special education and related services must be provided at public expense and at no cost to the parent, the answer must be in the affirmative.

It is undisputed that the child involved in this case is physically able to attend school. The courts below found, however, that to attend school without C.I.C., the child would suffer a potential risk and danger to her general health, as would a child in need of kidney dialysis. Whether or not states and local schools are required by the Act to provide the medical treatment necessary to avoid the potential general health risk is of monumental importance and should be definitively answered by this Court.

B. The Decision Below Conflicts With Applicable Decisions Of This Court.

In *Rowley, supra*, 102 S.Ct. at 3041, this Court set forth the role of the courts in suits brought under the Education for All Handicapped Children Act (EAHCA). "A court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the state complied with the procedures set forth in the Act? Second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive *educational* benefits. (Emphasis added.) Respondents have never asserted that the State or Local District failed to comply with the procedural requirements of the Act. Moreover, they have never asserted that the State's plan violates the Act. They have only asserted that the child's IEP should include the medical treatment desired, which medical treatment is not related to the educational effort, but to general health considerations. Thus, the Court of Appeals and the District Court have overlooked the educational nexus described by this Court in *Rowley*. The Court of Appeals determined that the thorny issue of what circumstances might call for judicial modification of an IEP was unnecessary since the District did not present evidence that the educational setting established by the

IEP was not appropriate. App. p. 76a. However, although the State Board of Education found that the IEP met with the standards of the State Education Agency and complied with applicable statutes and regulations, an assertion was never made that the State plan violated EAHCA requirements, the Courts below ordered the State and Petitioner to modify the child's IEP to include C.I.C.. Therefore, the District Court and the Court of Appeals have judicially modified the child's IEP to include an alleged "related service" which was stipulated to be "medical treatment" and which is totally unrelated to the effort to educate. In *Rowley, supra*, 1025 S.Ct. at 3049, n.26, this Court quoted its opinion in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981), in construing the EAHCA as being also enacted pursuant to Congress' spending power as follows:

> "As already demonstrated, the Act and its history imposes no requirements on the states like those imposed by the District Court and the Court of Appeals. A fortiori, Congress has not done so unambiguously, as required in the valid exercise of its spending power."

Although § 1401(17) App. p. 110a specifically limits medical services to those having to do with diagnosis and evaluation, the District Court and the Court of Appeals have judicially modified the child's IEP to include "medical treatment" not unambiguously required by Congress. Therefore, the decisions of the District Court and the Court of Appeals are in conflict with this Court's prior opinion in both *Rowley* and *Pennhurst;* and this Writ should be granted.

In *Rowley*, this Court determined that, if the requirements of its twofold inquiry under the EAHCA were met, the state has complied with the obligations imposed by Congress; and the courts can require no more. *Rowley*,

102 S.Ct. at 3051. In *Pennhurst*, 101 S.Ct. at 1545, this Court referred to its decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361, stressing that Congress understood that accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so. The Court of Appeals misconstrued this Court's decisions in *Rowley*, *Pennhurst*, and *Davis* by imposing an affirmative obligation to provide medical treatment pursuant to the EAHCA, which is a funding statute. Certainly, the State of Texas, through the State's local school districts, has not voluntarily and knowingly accepted the potentially massive financial obligations of providing medical treatment by contracting to receive federal assistance for education for the handicapped.

Although the Court of Appeals recognized the issues presented by this Court's decisions, the panel felt constrained to follow the decision in *Tatro I*. App. p. 79a.

The Court of Appeals also discussed this Court's decisions in *Pennhurst* and *Davis* when determining that the District Court properly awarded attorneys' fees under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, again relying on the decision in *Tatro I* App. p. 79a. The District Court and the Court of Appeals determined that this Court had not spoken with sufficient clarity in *Pennhurst* to allow departure from the decision of the Court of Appeals in *Tatro I* holding that refusal to provide C.I.C. violated § 504. In view of *Pennhurst*, *Rowley*, and *Davis*, C.I.C., which is stipulated to be medical treatment, is not required by the EAHCA or the Rehabilitation Act;' and as this Court stated in *Davis*, if the regulations implementing the Act can be read to have imposed such an affirmative obligation, then such regulations con-

stitute an unauthorized extension of the obligation imposed by the statute. *Davis*, 99 S.Ct. at 2369. Since both the EAHCA and the Rehabilitation Act are funding statutes, the above language applies. The courts below, determining that medical treatment is a related service and that failure to provide same violates both the EAHCA and the Rehabilitation Act and awarding attorneys' fees under § 504, have misapplied this Court's decisions in *Rowley*, *Pennhurst*, and *Davis*. Therefore, important federal questions have been decided in conflict with applicable decisions of this Court, and this Court should grant review herein.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-79-1281-G

HENRI and MARY TATRO, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
MAY 26 1981
JOSEPH VICEROY, JR. CLERK
By ????????
Deputy

MEMORANDUM OPINION

Amber Tatro is a five year old female suffering from myelomenengocele, commonly known as spinal bifida.[1] As a result of

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[1] In accordance with the Court of Appeals' Order of Remand in *Tatro* v. *Texas*, 625 F.2d 557 (5th Cir. 1980), this court has tried this case. This opinion sets forth the court's findings of fact and conclusions of law. The general nature of this suit has been described both at 481 F.Supp. 1224 (N.D.Tex. 1979) and 625 F.2d 557 (5th Cir. 1980).

The parties stipulated in the Pre-Trial Order that the preparation, materials and procedure for performing CIC on females is generally as follows:

(1) Equipment and Materials:

(a) Clean catheter in size prescribed by treating physician;

this birth defect, Amber suffers from orthopedic and speech impediments and a neurogenic bladder. Because of her bladder condition, Amber is unable to void voluntarily, and must be catheterized several times each day. The method of choice is Clean Intermittent Catheterization ("CIC").

(b) Catheter carrying containers;

(c) Catheter extension when patient is in a wheelchair;

(d) Clear plastic liquid detergent container with a hanger when patient is in a wheelchair;

(e) Soap and water;

(f) Container for catching the urine;

(g) Table or desk on which to place the child;

(h) Large underpad to prevent soaking of liners or other table covering; and

(i) Water soluable lubricant.

(2) Preparation and Procedure:

(a) Get all the equipment and materials ready.

(b) Wash hands with soap and water.

(c) Get the child ready and place her on her back on the table or desk (CIC is easier to perform at table or desk height).

(d) Spread labia apart with one hand and wash genitalia with soap and water with the other hand, always moving in a downward direction (never working in an upward direction since doing so will move germs from around the rectum up into the area of the bladder opening).

(e) Hold the catheter one inch from the tip and insert it into the urethra until the urine flows.

(f) Hold the catheter in place until the urine stops draining, then push the catheter in another inch or so to be sure the bladder is completely emptied.

(g) Remove the catheter slowly, stopping any time urine flows so as to empty the bladder completely. When the catheter is ready to come out, hold the catheter tip up so that the urine will drain down from the tip of the catheter and not on you.

(h) After noting and recording the amount of urine obtained, its appearance for any abnormality, discard the urine.

(i) Clean the catheter with soap and water, allow it to dry and place it in a clean, dry envelope. At least once a day after the catheter has been washed with soap and water, place it in a pot of

In early 1979 Mary Tatro, Amber's mother, asked the Irving Independent School District ("school district") to provide Amber with special education. After testing Amber, the school district developed an Individual Education Program ("IEP") which it believed would provide Amber with the necessary educational and therapeutic services. Amber then was recommended for placement in the school district's Early Childhood Development Classes beginning September, 1979. The school district, however, maintained that it had no obligation to provide CIC.

In June of 1979, Amber's parents appealed to an Impartial Due Process Hearing Officer the school district's decision not to provide CIC. They did not otherwise question the appropriateness of the IEP. The Hearing Officer found the school district to be obligated to furnish CIC, and recommended that Amber's IEP be modified accordingly. This decision was appealed to and affirmed by the State Commissioner of Education. The school district then appealed to the State Board of Education, which reversed the Commissioner.

On October 12, 1979, the Tatros brought this action seeking an injunction ordering defendants[2] to provide Amber with CIC and to recover compensatory damages and attorneys' fees.

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water and boil for 20 minutes. Allow it to air dry and place it in a clean dry envelope.

(j) Catheterize at prescribed intervals so that there is never more than 5 ounces (150cc) of urine in the bladder at any one time for a female child of one to five years of age.

(k) Keep a daily record of the time of catheterization, the amount of urine obtained, and if the child is wet, damp or dry.

(l) Do not crede the bladder as it may push urine back into the kidneys.

[2] As of the Amended Complaint of November 8, 1979, the defendants are the State of Texas, The Texas Education Agency, Alton Bowen (the Commissioner of Education), the State Board of Education, the individual members of the Board of Education, the school district, the Board of Trustees for the school district, the individual members of the Board of Trustees, and J. F. Townley, individually,

In its Memorandum Opinion filed December 21, 1979, 481 F.Supp. 1224, this court, relying upon a written stipulation of facts believed to have been agreed to by the Tatros and the District, held that neither the Education of All Handicapped Children Act ("EAHCA"), 20 U.S.C. § 1401 *et seq.*, nor the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, requires the school district to provide Amber with CIC. After the December 21, 1979 Order, the school district advised the Court of Appeals, but not this court, that it had not actually signed the filed written stipulation. On September 2, 1980, the Court of Appeals vacated that ruling, and held that the school district was obligated under both the EAHCA and § 504 of the Rehabilitation Act to furnish CIC. 625 F.2d 557. In remanding for further proceedings, the Court of Appeals recognized that there was no factual record upon which to base an opinion, but nonetheless proceeded to address the merits of the case. The court then directed this court to make appropriate findings to determine whether plaintiffs are entitled to relief under either statute as construed by it. 625 F.2d at 558 n.1.

Applying the Act as interpreted by the Court of Appeals, on January 16, 1981, this court issued an Interim Order directing the school district to provide Amber with such CIC as necessary to her IEP. Amber was enrolled with the school district on January 19th, and until January 23rd, the school district provided CIC. During that week a dispute between the school district and Mary Tatro developed concerning the adequacy of a parental consent form with attached physician's prescription submitted by Mary Tatro to the school district. Believing the consent inadequate and that it was not required under the Interim Order to furnish CIC without a valid consent form, the school district discontinued CIC on January 26th. Amber, however, continued to attend her classes, with CIC provided

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as superintendent of the school district. Although it is unclear from the pleading, plaintiffs indicated at the hearing that the named individuals are sued in their individual capacity. Townley was dismissed from this action by Order of December 21, 1979.

by her babysitter as necessary. On March 13, 1981, the Tatros questioned the school district decision by filing a motion for sanctions. At the hearing on the motion, a consent form and physician's prescription acceptable to both the Tatros and the school district was agreed upon. With this collateral dispute resolved, the school district resumed CIC on April 1, 1981 (after spring vacation). A final hearing was held on April 23, 1981, to allow the Tatros to offer additional evidence as to damages and to supplement their request for attorneys' fees. At this hearing, the court denied the motion for sanctions because it found that the school district had acted properly, and within the spirit of the Interim Order.

At the outset, it is important to place the school district's refusal in perspective. At no time has the school district refused to place Amber in its Early Childhood Development Classes. Instead, the school district urged Amber's parents to enroll her in the program and make private arrangements for CIC pending the final disposition of the legal dispute.[3] Despite the benefits of placing Amber in the program, her parents chose to forego such an arrangement, and instead kept Amber at the Helping Hand Development Center[4] for an additional

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[3] Although Amber's parents apparently expressed an initial preference for a full day rather than the half day program in which Amber would have been enrolled, the only aspect of the IEP raised at the administrative proceedings or before this court was the school district's unwillingness to furnish CIC.

[4] The Center provides theraputic services for the mentally and physically handicapped. It does not offer educational services. From September through December, 1980, Amber was enrolled at the Special World Day Care Center, where she received kindergarten classes. While there, she was transported to the Helping Hand Development Center several times each week for physical therapy.

year. Amber's parents did not attempt to enroll Amber with the school district for the 1980/81 school year.[5]

The State Defendants

In its Memorandum Opinion of December 31, 1980, this court dismissed any claims for retrospective relief against the State defendants (the State of Texas, the Texas Education Agency and the State Board of Education) on the basis of their 11th Amendment immunity.[6] *See Quern* v. *Jordan*, 440 U.S. 332 (1979). Because the State Board of Education has supervisory responsibility for assuring that Amber is educated in accordance with the EAHCA, *see* 20 U.S.C. § 1412(6); *S-1* v. *Turlington*, 635 F.2d 342, 350 (5th Cir. 1981); *Kruelle* v. *New Castle County School Dist.*, Nos. 80-1875, 80-1876, 80-2063, 80-2064 (3rd Cir., April 1, 1981), the members of the State Board of Education will be retained in their official capacities for the purpose of injunctive relief. Plaintiffs joined the State Commissioner of Education in his capacity as "director" of the Texas Education Agency. Because the members of the Board of Education are the proper parties for injunctive relief, the Commissioner is DISMISSED in his official capacity. The State of Texas and the Texas Education Agency are DISMISSED. *See Alabama* v. *Pugh*, 438 U.S. 781, 782 (1978).

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[5] By letter of September 9, 1980, and again, by letter of October 21, 1980, the school district requested permission to reevaluate Amber so as to update her IEP. Mary Tatro, in a letter dated November 20, 1980, informed the school district that she believed a new assessment to be inappropriate, but agreed to allow Scottish Rite Hospital to provide the school district with some information.

[6] Such an immunity also applies to Commissioner Bowen and the members of the State Board of Education to the extent they are sued in their official capacity.

Commissioner Bowen And The Members Of The State Board Of Education

There is no prospective relief to which plaintiffs are entitled against Commissioner Bowen or the members of the State Board of Education in their individual capacities.

State officials sued in their individual capacities do not, of course, share their State's 11th Amendment immunity. They, however, are entitled to a qualified good-faith immunity, provided such defense is properly pled. *See Wood* v. *Strickland*, 420 U.S. 308 (1975);[7] *Gomez* v. *Toledo*, 100 S.Ct. 1970 (1980).

The record is bereft of any evidence that Commissioner Bowen or any member of the State Board of Education acted with anything but good-faith. There is no evidence that they intentionally attempted to violate plaintiffs' rights or acted with malice toward plaintiffs. In that the Board's decision that CIC is not a "related service"[8] was affirmed by a federal district court, it cannot be found that its members knew or reasonably should have known that such is not the case.

Having pled the good-faith defense, there being no evidence that they acted in any other manner, and the uncertainty of the law providing affirmative evidence of good-faith, Commissioner Bowen and the individual members of the State Board of Education are DISMISSED.

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[7] In *Wood* the Court recognized a qualified good-faith immunity from liability for damages under § 1983. The Court found that there was no basis for believing that Congress intended to eliminate the traditional common law good-faith immunity available to school officials. 420 U.S. at 318-22. Even assuming that damages are available under the EAHCA or § 504, there is no basis for believing that Congress intended to abrogate that good-faith immunity through either statute.

[8] Commissioner Bowen affirmed the Hearing Officer's finding that CIC is a "related service." Plaintiffs have never clarified why this decision should subject the Commissioner to personal liability for compensatory damages.

The Members Of The Board Of Trustees

Plaintiffs also have joined the individual members of the Board of Trustees of the school district. In that there is no equitable relief to which plaintiffs are entitled against the individual Trustees, plaintiffs' sole basis for the Trustees' presence in their individual capacities is that they may be liable for compensatory damages.

Plaintiffs have advanced one argument for why the Trustees are not entitled to the *Woods* v. *Strickland* qualified good-faith immunity. Plaintiffs contend that as a result of a Department of Health, Education and Welfare letter of September 27, 1979, the Trustees knew or should have known that they were violating plaintiffs' rights. That letter informed the superintendent of the school district that the Office for Civil Rights had concluded from its investigation that the school district was violating § 504 by not providing CIC. It should be noted, however, that the letter was sent almost three weeks after the school district's decision had been affirmed by the State Board of Education.[9]

There is no evidence that the Trustees acted with malice or intentionally attempted to deprive plaintiffs of their rights. The President of the Board of Trustees testified that it was the belief of the Board that the school district was not legally obligated to provide CIC. He further testified that the Board was concerned that CIC is a medical practice, and, therefore, cannot be performed lawfully by employees of the school district. *See* pages 11-13, *infra*.

If for no other reason, because the Board of Trustee's construction of applicable federal law was upheld by the State Board of Education, and, later, by this court, the members of the Board of Trustees are not deprived of their qualified good-

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[9] HEW's conclusion that the school district was violating § 504 was based, in part, on the finding that CIC is a "related service," as defined by 45 C.F.R. § 121a.13. The Board of Education previously had ruled that CIC is not a "related service."

faith immunity by the HEW letter. Although the Board's belief as to its duty to furnish CIC has to date proved to be an incorrect assessment of the law, it was not an unreasonable conclusion. *See Wood* v. *Strickland, supra,* at 321-22.[10] The members of the Board of Trustees are DISMISSED in their individual capacities.

The EAHCA

In its 1979 Memorandum Opinion, this court held that CIC is not a "related service" within the meaning of 20 U.S.C. § 1401(17) and that the EAHCA, therefore, does not require the school district to furnish CIC. Defendants argued that CIC is a medical service, and thus not covered by the Act. Under this court's view it was unnecessary to reach this definitional issue. This court found that Congress had not intended "related services" to sweep so broadly as to include services which do not "arise from the effort to educate." The Court of Appeals disagreed with that construction. The school district now returns to its earlier argument that CIC is an exempt medical service. This court will first describe CIC and then turn to its proper classification under the EAHCA.

Despite its present widespread use, CIC has become an accepted procedure only in recent years. Before CIC became an accepted practice, a substantial number of physicians believed that penetration of the urethra ought to be done only in a sterile environment with sterile instruments. The only alternative entailed exerting manual pressure upon the bladder. This pressure technique, however, presented a risk of reflux of fluid and injury to the kidneys. CIC is a far more simple

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[10] The Court in *Wood* was concerned that ignorance not be used as a basis for immunizing violations of "clearly established constitutional rights." The obligation of a school district to furnish CIC hardly can be considered a settled question of law. As noted in *Wood*, school board members cannot be "charged with predicting the future course of [the] law." 420 U.S. at 322.

procedure. The catheter need not be sterile nor must its use be confined to a sterile environment. Obviously, CIC requires relatively less direct medical superintendence than this earlier used method.

There is dispute about when Amber must be catheterized each day. The parties stipulated that Amber must be catheterized approximately four times a day, but the stipulation does not further address when it is needed despite the fact that her need for catheterization on any given day largely is a function of her fluid intake. Because Amber has no sensation of bladder fullness, she is dependent upon a routinized schedule of catheterization to insure proper voiding.[11] The evidence indicates that CIC performed approximately every three to four hours is sufficient to prevent injury to Amber's health. The appropriate schedule may vary, however, as Amber continues to mature.

In sum, CIC has become a relatively simple procedure that can be taught in less than an hour. Amber has been catheterized by her parents, her babysitter, her teachers and teachers' aides at the Helping Hand Development Center, and her teenage brother. In a few years, Amber should be able to catheterize herself.

EAHCA

The EAHCA does not define medical services, except to provide that only medical services for diagnostic and evaluation purposes are related services. 20 U.S.C. § 1401(17). The implementing regulations shed a little more light. They define medical services as "services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services." 45 C.F.R. § 121a.13(b)(4). The regulations further provide that "school health services" are related serv-

[11] Improper voiding may result in influx, a condition in which urine backs up in the kidneys.

ices, and, by implication, not exempt medical services. *Id.* § 121a.13(a). "School health services" are defined as "services provided by a qualified school nurse or other qualified person." *Id.* § 121a.13(b)(10). The statute and its implementing regulations suggest that medical services are services that can be provided lawfully only by a licensed physician. But they give no direct guidance as to precisely what "provided by a licensed physician" means.

The school district argues that all services that must be performed under the control and supervision of a licensed physician are "provided by a licensed physician." Plaintiffs' response seems to be that the appropriate test is not one of control and supervision, but whether CIC must be performed only in the presence of a physician.

Texas Law

This court is here construing an act of Congress of nationwide application. And it ought to be given a uniform construction. Yet Congress, by defining the Act's reach by definitions locatable only in the law of the respective States, perforce intended, at least to this extent, that its construction be parochial. A contrary view would require a finding that Congress intended to alter patient-doctor relations in the several States. Stating the proposition answers it. The types of medical treatment that can be performed by nonphysicians, and the extent to which any treatment must be under the control and supervision of a licensed physician, are regulated by State law. And the courts must look to State law to determine whether a service is a medical service. To the extent of the accommodation of varying practices, the Act tolerates non-uniform application. A given service, therefore, may be a related service in one State and an exempt medical service in another.[12] This court turns now to the law of Texas.

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[12] That State law must determine who can provide a service is recognized by the commentary following § 121a.13, which states:

> There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a

The school district contends that under the Texas Medical Practice Act, *Tex. Rev. Civ. Stat. Ann.*, art. 4495, *et seq.* (Vernon 1976), its employees can provide CIC only if they are under the control and supervision of a licensed physician. To furnish CIC without such direction, it argues, would be to engage in the unlawful practice of medicine. *Id.*, art. 4510, 4510a & 4510b. Yet, to require it to retain a physician to control and supervise the provision of CIC would convert CIC into a medical service it is not required to furnish.

This court has been forced to inquire into the legal responsibility of Texas physicians to control and supervise prescribed treatment, a subject that has received little judicial attention. The task includes fitting together a three party relationship: the school district, the child and the child's doctor. The interest and concern of the medical profession is plain. At a practical level it makes little sense to require school districts to provide a service that cannot be provided without a prescription if physicians will not write them for fear of running afoul of their own Practice Act and the demands of their malpractice insurance carriers. For these reasons, this court invited the Texas Medical Association and the Dallas County Medical Society to participate as amicus curiae. The medical societies submitted a joint brief stating their view of the Texas Medical Practice Act.[12A]

The parties agree that the school district cannot provide CIC without a valid medical prescription. To do so would constitute the practice of medicine in violation of Article 4510b. A physician, however, may prescribe treatment to be performed by

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variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

[12A] For the aid of treating physicians, their brief is attached as an appendix to this Opinion.

another individual or an institution if he believes that individual or institution capable of providing the prescribed service in a competent manner. Such treatment by the delegate does not constitute the unlawful practice of medicine. *See Thompson* v. *Texas State Board of Medical Examiners*, 570 S.W.2d 123, 129-30 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). Nor is the physician obligated to supervise directly the treatment he has prescribed; his duty is to ascertain that the person or institution providing the treatment in conformity with his prescription is adequately qualified.

This construction is consistent with the Texas Nursing Practice Act, *Tex. Rev. Civ. Stat. Ann.* art. 4513 *et seq.* (Vernon 1976). Article 4518(5) of that Act defines professional nursing "as the performance for compensation of any nursing act . . . in the administration of medications or treatments as prescribed by a licensed physician." *Id.* (Vernon Supp. 1980-81). Providing such treatment is a nursing act, and, therefore, not unlawful practice of medicine whether or not the nurse is under the direct supervision and control of the prescribing physician. *See Op. Tex. Atty. Gen.* No. H-1295 (Dec. 28, 1978) ("Professional nurses may also administer medications and treatments on a physician's prescription . . . without any statutory requirement of direct supervision by the physician.")

A physician thus may prescribe CIC to be furnished by a school district if he believes that the district has personnel qualified to perform CIC.[13] The school district retains professional nurses. CIC has been prescribed for Amber by a licensed physician, and a proper prescription for such treatment now has been submitted to the school district. Moreover, the parties concede that with only minimal additional training a professional nurse should be more than capable of performing CIC. In sum, the court is persuaded that furnishing CIC does

[13] It follows that a school district must secure the services of persons sufficiently trained to allow a treating physician to prescribe with a view toward prescription implementation by the school.

not constitute the unlawful practice of medicine when performed by professional nurses in accordance with a valid medical prescription. *See Tex. Rev. Civ. Stat. Ann.* art. 4510b (Vernon 1976).[14] Because services that can be provided by qualified school nurses are "school health services," and, therefore, "related services," *see* page 10, *supra*, CIC is not an exempt "medical service" within the meaning of the EAHCA.[15]

The school district contends that even if CIC is not a medical service, it is not a related service in her case because it is not

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[14] This court does not hold that CIC can only be performed lawfully by professional nurses. Lay persons, with proper medical training, may, in accordance with a valid prescription, provide treatment that without such training and prescription would be considered unlawful practice of medicine. Plaintiffs have presented testimony that Scottish Rite Hospital will provide to school district employees free instruction in CIC. Provided the physician has ascertained that such training is sufficient to qualify a person to perform CIC, he can prescribe CIC to be furnished by a school district through its professional nurses *or* those non-nursing employees who have received such training.

[15] It is unclear whether a physician is liable for independent acts of negligence of school district employees performing services in conformity with his prescription. In *Sparger* v. *Worley Hospital, Inc.*, 547 S.W.2d 582 (Tex. 1977), the Texas Supreme Court rejected the "captain of the ship" doctrine in favor of the "borrowed servant" doctrine. Arguably, under *Sparger*, the prescribing physician would not be liable for independent acts of negligence by school district employees as long as he exercised ordinary care in prescribing that the treatment be performed by school district personnel. But, to the extent that a physician controls, supervises, or instructs unlicensed persons providing nursing care, he may be liable for their acts. *See Op. Tex. Atty. Gen.* No. MW-318, at 1016-17 (April 1, 1981). Although the Attorney General takes a somewhat narrower view, *see id.*, on the facts of *Sparger*, it does not appear that a prescribing physician exercising ordinary care would be liable for the school district's negligence simply because he prescribed the treatment. But the question has not been dispositively resolved by the Texas courts.

"required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401(17). Specifically, they argue that Amber can attend the school district's Early Childhood Development Classes without CIC during her hours of attendance.

The majority of five-year olds in the school district attend a half-day program, and only ??? attend more than half-day. Upon recommendations of the district's Coordinator for Early Childhood Training, Amber has been placed in the half-day program which lasts two hours and forty-five minutes. While there was no evidence as to the exact time needed to bus Amber to school, its range is approximately fifteen to thirty minutes each way. Assuming the maximum thirty minutes, Amber will be under the school district's supervision for almost four hours each school day.

This court finds that Amber will require catheterization during her school hours if she is to attend the school district's half-day program. The medical evidence presented at trial establishes that while it cannot be determined definitively whether a daily interval of four hours between catheterizations will injure Amber, it does present a risk of serious injury. Amber is not required to accept such a risk in order to attend school. Under the EAHCA, Amber is entitled to have her IEP modified to have the school district furnish CIC. Without such a modification, Amber's IEP fails to provide a "related service" that is "required to assist [Amber] to benefit from special education." 20 U.S.C. § 1401(17).

For the stated reasons, the school district is ordered to modify Amber's IEP to provide for CIC as prescribed by her personal physician.[16] In this regard, this court finds that plain-

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[16] Although this court uses the term "personal physician" in its Order, any physician treating Amber regularly may prescribe CIC. It also is not necessary that the prescribed treatment be identical to the procedures set out in the pre-trial order, *see* note 1 *supra*, so long as they are prescribed by a licensed physician. Throughout this dispute, one of the school district's stated concerns has been that it

tiffs will suffer irreparable harm if such prospective relief is withheld, that the cost to defendants from such an order is minimal, and that the public interest is served by ensuring that Amber receives a free appropriate public education.[17]

§ 504

Because plaintiff's recovery of counsel fees may ultimately turn on whether a violation of § 504 has been proved, that statute is discussed in that context. *See* pages 30-31, *infra*.

Damages

The Tatros seek damages for expenses incurred in sending Amber to the Helping Hand Development Center and the Special World Day Care Center, and an additional award of $50,000 for the violation of Amber's rights.

The federal district courts have split on whether the EAHCA provides a private right of action for damages. *Compare Monahan* v. *Nebraska*, 491 F.Supp. 1075, 1094 (D.Neb. 1980), *aff'd in part vacated in part* (8th Cir., April 1, 1981) *and Boxhall* v. *Sequoia Union High School District*, 464 F.Supp. 1104, 1112 (N.D.Cal. 1979) *with Miener* v. *Missouri*, 498 F.Supp. 944, 949 (E.D.Mo. 1980) *and Anderson* v. *Thompson*, 495 F.Supp. 1256, 1269 (E.D.Wis. 1980) *and Loughran* v. *Flanders*, 470 F.Supp. 110, 113-15 (D.Conn. 1979). The Act provides that the reviewing court may grant such relief as it

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not be required to exercise medical discretion in furnishing CIC. The latest consent form submitted by Amber's parents includes, at this court's request, her physician's statement on how Amber is to be catheterized and the precise times during the day she should be catheterized. The school district thus is relieved from having to exercise medical discretion.

[17] As for the school district's earlier suggestion that there has been no showing that the school district receives federal funds, the superintendent of the school district conceded that the school district receives federal funds allocated for special education.

determines to be appropriate. 20 U.S.C. § 1415(e)(2). Reimbursement for substitute educational services is consistent with the congressional purpose that handicapped children be furnished free appropriate education. *See Monahan* v. *Nebraska*, *supra*, at 1094. But the cost of recognizing a general right of recovery is that educational institutions may be inhibited from implementing new curricula and techniques for fear of exposure to liability. *See Loughran* v. *Flanders*, *supra*, at 115. Such a development could frustrate Congress' intent to expand and improve the education and related services available to handicapped children. *Id.* at 114. These concerns seem relevant to whether the relief would be appropriate. We do not here reach this question because the actual proved damages are of a different sort.

While plaintiffs occasionally have suggested that they are entitled to a wide range of compensatory damages, the only damages they were able to prove was the cost of sending Amber to the Helping Hand Development Center and the Special World Day Care Center. *See* page 4, *supra*. The issue here thus is not whether the EAHCA exposes school districts to open-ended tort liability, but whether school districts must reimburse parents of handicapped children for the cost of providing services the district was obligated to furnish but did not. In this regard, it is important to note that damages for such substitute services are only available where the child is applying for *initial admission*. Once the child is enrolled in a public school, the EAHCA requires the child to remain in its current educational placement pending EAHCA proceedings. 20 U.S.C. § 1415(e)(3); *see Stemple* v. *Board of Education*, 623 F.2d 893, 897-98 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3606 (1981). Thus, if the parents remove the child from school while proceedings are pending, they will not be reimbursed for the cost of providing appropriate private education. *See id.*

Where, however, as here, the parents cannot enroll the child without a risk of injury to the child because a school will not provide a required related service, appropriate relief ought to include the cost of alternative sources of education and ther-

apy. Such discretion on the part of the parents is implicit in the requirement of § 1415(e)(3) that the school district enroll the applicant in its school program *with the consent of the child's parents or guardians*. The school district, by reimbursing the parents, indirectly bears the cost it would have borne directly had it furnished the services it was obligated to provide. That is, the money "damages" reflect no more than a judicially compelled provision of the statutorily ordered free appropriate education. This relief seems to fall within the congressionally mandated duty to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). This court here expresses no opinion on whether a similar analysis is appropriate where parents can enroll their child in the school district's program without risk to the child's health.[18]

This court thus concludes that for the limited type of damages plaintiffs have proved, they are entitled to recover under the EAHCA. Their right to recover, of course, is qualified by their duty to mitigate.

Plaintiffs claim that they suffered damages of $444 per month while Amber was enrolled at the Development Center (September, 1979 through August, 1980),[19] and $45 per week plus $100 per month during the sixteen weeks Amber was at

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[18] Where the parents can enroll the child in the public school, and make private arrangements to remove the source of danger, under § 1415(e)(3) the school district may not be obligated to reimburse any more than the marginal cost of making its program acceptable. This, of course, simply restates plaintiffs' general duty to mitigate, discussed *infra*.

[19] Plaintiffs' out-of-pocket expenses were $191 per month. Under the collateral source rule, plaintiffs are entitled to the reasonable value of the services rendered by the Helping Hand Development Center even though most of the Center's expenses were paid by private charities. *See Restatement (Second) of Torts* § 921, comment c(3); *see generally* "Collateral Source Rule: Receipt of Public Relief or Gratuity As Affecting Recovery In Personal Injury Action," 77 A.L.R.3d 366 (1977).

the Day Care Center (September 1 through December 22, 1980). Plaintiffs' total claim up until this court's Interim Order thus is $6,419 plus attorneys' fees (*see* pages 31-35, *infra*).

The school district argues that even if plaintiffs are entitled to damages, they breached their duty to mitigate by not placing Amber in the chool district's Early Childhood Development Classes and privately arranging for CIC. The district also notes that plaintiffs' expenses were for full-day supervision, some of which would have been incurred even if Amber had attended the school district's half-day program.

Plaintiffs' burden includes proof that the asserted damages were proximately caused by the alleged injury. *See Prosser on Torts* 236-44 (4th ed. 1971). In this, plaintiffs' proof is less than adequate.

Plaintiffs imply that none of the costs of placing Amber inthe Helping Hand Development Center and the Special World Day Care Center would have been incurred had Amber been attending school. The evidence does not support their contention. As previously noted, Amber was scheduled to attend the school district's half-day program. Because both of Amber's parents are employed full time, it would have been necessary to arrange for supervision during the remainder of the day. Amber's parents thus would have had to arrange, at their own expense, for a day care center or a private babysitter for the period that Amber was not in school.[20] Indeed, a school district employee testified that many of the district's half-day pupils are bussed directly from school to their day care center or babysitter.

The school district notes that at least some of plaintiffs' expenses for outside supervision would have been incurred whether or not Amber had been placed with the school district.

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[20] Although the programs of the Development Center and Day Care Center are almost full-day, Amber apparently had a private babysitter for part of the late afternoon.

Plaintiffs offered no evidence from which this court can determine which of their expenses were incurred because of the school district's failure to provide CIC, and which would have been incurred under any circumstances.[21] It is plaintiffs' burden to show that their expenses are sufficiently related to the alleged injury that compensation is warranted. Here, on the basis of the record, any such determination is purely speculative, and cannot be made. Although plaintiffs presumably could have submitted evidence from which this court could calculate the damages proximately caused by the school district, they have not done so.

There is one exception to this analysis. Amber received physical therapy at the Helping Hand Development Center from September, 1979, through May, 1980, and September through December 22, 1980,[22] that would have been provided by the school district had Amber been able to attend the school district's half-day program. A reasonable value of $100 per month was placed on that service. Plaintiffs, therefore, are entitled to damages, not including attorneys' fees, of $1,271.

There is substantial merit to defendants' contention that plaintiffs failed to mitigate damages. A school district employee testified that she had recommended to Amber's parents that Amber be enrolled with the school district and that CIC privately be arranged pending the dispute's resolution. If the district lost, it would reimburse plaintiffs' expenses. Plaintiffs

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[21] Mary Tatro testified that she paid Amber's babysitter $15 to $25 per week. But the hours that Amber was placed with her babysitter appear to be far less than what would have been necessary had Amber been attending the school district's half-day program. Moreover, there was no evidence that such services would have been available, or that Amber would have been placed with a babysitter rather than in a day care center for that period.

[22] Amber also received such therapy from June through August, 1980. Amber's IEP did not, however, indicate that she would be receiving any therapy during the summer months, and there is no evidence that such would have been provided by the school district.

never satisfactorily explained why they chose to forego this option. Their failure to make such an arrangement is particularly disturbing in that plaintiffs arranged for Amber to be catheterized at school by her babysitter for over two months after this court had entered its Interim Order. See pages 4-5, *supra*. Plaintiffs introduced much evidence to show how simple a procedure CIC really is, and how quickly and safely it can be performed by a lay person with only an hour's training. Amber would have needed to be catheterized only once during her school day at some pre-arranged time. This court agrees with defendants that it would have been a reasonable and relatively simple solution for plaintiffs privately to have arranged for such a service.[23]

The burden of showing failure to minimize damages rests with the wrongdoer. *See Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 932 (5th Cir. 1979). The defendant must show that the failure was unreasonable and had the consequence of aggravating the harm. *Id.* Defendants have demonstrated the first element, but not the latter. The only evidence on what the cost of privately arranged CIC might have been is the value placed by Amber's babysitter on her own services. Amber's babysitter testified that although she did not charge plaintiffs for her trips to the school to catheterize Amber and did not expect any remuneration, she valued her services at ten dollars per trip. No foundation, however, was laid by plaintiffs to show that Amber's babysitter had sufficient personal knowledge to testify as to the reasonable value of catheterization services. But even accepting ten dollars per trip as the reasonable value of privately arranged catheterization, it is obvious that over the relevant period (September, 1979 through December, 1980), plaintiffs would have expended more than $1,271 in such services. Thus, plaintiffs' conduct

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[23] The victim of plaintiffs' failure to mitigate is Amber. A school district employee and Amber's physician testified that Amber would have benefited from attending the school district's Early Childhood Development Classes.

may have been unreasonable but it did not aggravate the harm (that is, at least not when measured in dollars and cents, *see* note 23, *supra*).[24]

Plaintiffs also request damages (the cost of providing CIC)[25] and attorneys' fees incurred after this court entered its Interim Order. As earlier discussed, after providing CIC for approximately a week, the school district discontinued catheterization because of plaintiffs' failure to submit a parental consent form and physician's prescription meeting the school district's requirements. The school district contends that plaintiffs were uncooperative and unreasonable,[26] while plaintiffs maintain that the school district was not entitled to the type of consent form and physician's prescription it had requested. From the evidence adduced at the March 13th and April 23rd hearings, this court finds that the school district's requested parental consent form and physician's prescription were reasonable. Although the final agreed to consent form and prescription are not identical to those originally requested by the school district, they meet many of the school district's requirements. In particular, this court believes that the school district's insistence that the prescription be written in a manner not requiring medical discretion on its part was a legitimate request and one plaintiffs should have complied with.

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[24] Alternatively, if the testimony of Amber's babysitter is considered nonprobative, defendants failed to meet their burden by not offering any evidence on the cost of catheterization services.

[25] Presumably, plaintiffs contend that under the collateral source rule they are entitled to the value of the services rendered by Amber's babysitter, even though they suffered no out-of-pocket expenses. *See* note 19, *supra*.

[26] The school district offered evidence showing that at the time it and plaintiffs were discussing the consent form and prescription, Mary Tatro was threatening officials of the district with additional lawsuits as well as requesting the Texas Medical Association to investigate the school district's medical consultant.

This court also notes that the school district never disavowed its duty to provide CIC under this court's Interim Order, and went to some length to accommodate plaintiffs. Because the school district violated no duty, plaintiffs are not for this reason entitled to damages and attorneys' fees incurred after this court's Interim Order. We turn to the more difficult question of whether attorney fees are recoverable at all.[27]

Attorneys' Fees

The EAHCA does not provide for an award of attorneys' fees, *see Anderson* v. *Thompson*, 495 F.Supp. 1256, 1268-70 (E.D.Wis. 1980); *see also Hines* v. *Pitt County Bd. of Educ.*, 497 F.Supp. 403, 409 (E.D.N.C. 1980), and they are not recoverable unless they may be awarded pursuant to 42 U.S.C. §§ 1983, 1988; *see Maine* v. *Thiboutot*, 100 S.Ct. 2502 (1980); *Maher* v. *Gagne*, 100 S.Ct. 2570 (1980), or 29 U.S.C. §§ 794, 794a(b).

Since passage of 42 U.S.C. § 1988 in 1976, courts may in their discretion allow a prevailing party a reasonable attorney's fee as part of the costs in actions or proceedings to enforce certain statutory provisions. One of the listed provisions is 42 U.S.C. § 1983, and the Tatros throughout this suit have argued that they were seeking relief under § 504 of the Rehabilitation Act and § 1983 as well as the EAHCA.

The Tatros can recover counsel fees only under three possible theories. First, it can be contended that an award of counsel fees is "appropriate relief" under 20 U.S.C. § 1415(e)(2). Second, it can be argued that this is an action to enforce rights under 42 U.S.C. § 1983, and that § 1988, therefore, authorizes an award of fees. Third, the Tatros may be entitled to attorneys' fees under 29 U.S.C. § 749a(b) (§ 505) from a State denial of rights under § 504.

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[27] No evidence was offered to sustain the prayed for $50,000. Plaintiffs have not shown any bad faith or malicious conduct on the part of any defendant.

Maine v. *Thiboutot*, 100 S.Ct. 2502 (1980) seemed to provide strong support for the attorney fee application under the second theory. In *Thiboutot* the Court held that the "and laws" language of § 1983 allowed a suit for a denial by *Maine* of benefits to which plaintiffs claimed entitlement under the federal Social Security Act. The Court also held that the "any action" language of § 1988 authorized an award of counsel fees for the suit. Three justices dissented, expressing concern over the apparent open-ended reasoning of the majority. The dissent, authored by Justice Powell, pointed out that the majority's construction creates rights of action under § 1983 for which there is no grant of federal jurisdiction. It reasoned that, contrary to the effect of the majority's holding, § 1983 has always been read to be coextensive with 28 U.S.C. § 1343(3) which supplies jurisdiction for claims involving rights secured by the Constitution or by any act of Congress providing for equal rights of citizens. In listing by illustration the possible rights of action created by the majority, the dissenting justices observed that the "only exception will be in cases where the governing statute provides an exclusive remedy for violations of its terms. See *Adickes* v. *Kress & Co.*, 398 U.S. 144, 150-151, n.5 (1970); *cf.*, *Great American Fed. S. & L. Assn.* v. *Novotny*, 442 U.S. 366 (1979)." *Id.* at 2513, n.11 (parallel citations omitted).

Assuming for now the EAHCA to be an act of Congress providing for equal rights of citizens within the meaning of § 1343(3), this court has jurisdiction over the § 1983 claim. *Cf.*, *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600 (1979). It appeared that *Thiboutot* answered the question before this court, despite the caveat implicit in the expressed unease of three justices. Recently, however, the three were joined by Stewart and Stevens in *Pennhurst State School and Hospital* v. *Halderman*, 49 U.S.L.W. 4363 (April 20, 1981) in casting doubt on such a sweeping construction of *Thiboutot*. In *Pennhurst*, the Court suggested two qualifications to a possible § 1983 application. First, the right claimed to be denied by the State must be a "right secured" by the laws of the United

States. Second, Justice Powell's footnote in the *Thiboutot* dissent regarding exclusivity of remedy, 100 S.Ct. 2513 n.11, gained majority support. Even Justice White's dissent in *Pennhurst* acknowledged that "Congress may explicitly direct otherwise such as if the 'governing statute provides an exclusive remedy for violation of its terms.' " *Id.* at 4376. This court will address these two inquiries first in determining the applicability of § 1983 to the EAHCA, and then will turn to § 504.

The right to a free appropriate education is plainly secured by the Act. The more difficult question is whether Congress intended the remedies it created to ensure such an education to be exclusive; that is, whether the EAHCA falls under the "Powell exception." Undoubtedly, Congress can, by express language, provide either that a created remedial scheme is or is not the only enforcement mechanism for a congressional enactment.

In addressing the applicability of § 1983 to the EAHCA, this court will first assume that compliance with the Act's remedial scheme is not held to be a prerequisite to federal suit. *See Patsy* v. *Florida Intern University*, 634 F.2d 900 (5th Cir. 1981) (*en banc*), and will then make the contrary assumption. This court proceeds in both directions because there is substantial disagreement among the Circuits as to the exhaustion requirement, and the Supreme Court has not yet decided the question. This court usually would stop with an *en banc* decision of the Fifth Circuit because it binds this court. Here, however, there is a Janus faced quality to the reliance in this case upon § 1983 to enforce rights secured by the EAHCA. Plaintiffs face a virtual conceptual "catch-22." A contention that the EAHCA may be enforced by § 1983 without exhausting the EAHCA remedies breathes life into the argument that its remedial scheme is exclusive. But, a concession that such exhaustion is a prerequisite breathes life into the argument that no action under § 1983 has been prosecuted; that its citation alone is insufficient to trigger § 1988.

Exclusivity Without Exhaustion

The difficult task is the inferring of intended exclusivity of remedy from the detail of the particular remedial scheme. Here, applying the standards set forth in the Court's recent opinions, such an inference is both plain and compelling.

In *Pennhurst*, the majority did not reach the question of § 1983 applicability, having concluded that § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act conferred no substantive rights. Justice White, joined by Brennan and Marshall, reached a contrary conclusion and then faced the exclusivity issue. At the outset, the dissenting justices pointed to *Chapman* v. *Houston Welfare Rights Org.*, *supra*, for the proposition that "§ 1983 protections apply to all rights secured by federal statutes 'unless there is a clear indication in a particular statute that its remedial provisions are exclusive *or that for various other reasons a § 1983 action is inconsistent* with congressional intention.' " 49 U.S.L.W. at 4376 (emphasis added). The dissent reasoned that the creation of a federal agency to oversee a cooperative state-federal venture was not alone sufficient to infer that Congress intended the oversight to be exclusive. It then found language in § 6010's legislative history that Congress contemplated that the "rights" under § 6010 "should be protected and assured by the Congress and the courts." *Id.* at 4375-77. In sum, the dissenting justices found that *Thiboutot* "creates a presumption that a federal statute creating federal rights may be enforced in a § 1983 action." *Id.* at 4376.

The dissent's conclusion plowed no new ground. Where Congress has spoken explicitly, the Court has had little difficulty finding remedial exclusivity. *See Adickes* v. *S. H. Kress & Co.*, *supra*, (§ 1983 cannot supplement Title II, the Public Accommodation Provisions of the 1964 Civil Rights Act, 42 U.S.C. § 2000a). Where recognition of 42 U.S.C. § 1985(c), as supplementary to a detailed remedial scheme, would frustrate the scheme, the Court has found exclusivity. Thus, in *Great American Fed. S. & L. Assn.* v. *Novotny*, *supra*, the Court refused to allow prosecution under § 1985(c) of rights secured

by Title VII of the 1964 Civil Rights Act. The Court observed that § 1985(c) confers no substantive rights itself; that "[u]nder Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims." *Id.* at 372-73. The Court pointed to the requirement that a complainant must first go to a State employment commission, to the conciliation processes, and to the time limits for the filing of claims. It also noted that the Act withholds resort to the courts until these processes are exhausted. Finally, it observed that Title VII has been judicially construed as not allowing general or punitive damages or jury trials. Permitting the case to proceed under § 1985 would allow a complaint to by-pass the administrative process. After gathering analogical support from *Brown* v. *GSA*, 425 U.S. 820 (1976) (holding § 717 of Title VII to be the exclusive federal remedy for employment discrimination claims of federal employees) the Court concluded that "[u]nimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a course of action under § 1985(c)." *Id.* at 378.

The EAHCA is not silent about either the judiciary's or the administering agency's roles in resolving disputes arising under its provisions. Section 1415 details procedures granting parents access to records, written notice to parents of proposed changes or refusals to change the placement of a child, opportunity to present complaints regarding the education, and an impartial due process hearing by the State educational agency. The statute provides that the hearings will allow participation of counsel, cross-examination, a right to a verbatim record and written findings. Only after administrative remedies have been exhausted may *de novo* review by State or federal court be sought. Although the reviewing court may take additional evidence, the statute provides that the court shall receive the records of the administrative proceedings. 20 U.S.C. § 1415(e)(2). Finally, the statute mandates the

preservation of the status quo during the pendency of any proceeding under the Act. *Id.* § 1415(e)(3).

Given this carefully constructed scheme, the teachings of *Novotny* and *Brown* compel the conclusion that it need not be eviscerated by tolerance of § 1983 suits. Section 1983 creates no substantive rights but is solely a procedural statute. *See Chapman* v. *Houston Welfare Rights Org.*, *supra*. It is illogical to conclude that Congress created an elaborate administrative review mechanism at local and State levels, yet, simultaneously, envisioned that anyone wishing to do so, could proceed directly to federal court. While the federal courts are given an important role by the EAHCA, it is not an open-ended responsibility. Their role is limited in two material ways. First, the federal judicial review is not available until after at least two levels of State administrative review have failed to adjust the dispute. Second, under this scheme, even if the dispute is not resolved at the administrative level, the reviewing court will have before it a fully developed administrative record, presumably reflecting the nuances of the decisions of the school and the parents. Section 1983, however, has no such constraints. Moreover, like Title VII, judicial decisions have limited the type of damages recoverable under the EAHCA. For example, there is no recovery of private tuition expenses for children withdrawn from school before completion of the review procedure. *See Stemple* v. *Board of Education*, *supra*. Recognizing a right of action under § 1983 for rights "secured" by the EAHCA would open the door to a range of damages unavailable under the EAHCA, and thereby undermine the entire analytical focus of granting relief as appropriate under the EAHCA. Finally, the status quo requirement of § 1415(e)(3) could be cast aside if relief became available under § 1983. In the words of the *Novotny* majority:

> Unimpaired effectiveness can be given to the plan put together by Congress [in the EAHCA] only by holding that deprivation of a right created by [the EAHCA] cannot be the basis for a course of action under [§ 1983]. *Id.* at 378.

Yet, the compelling force of *Novotny* and *Brown* is met head-on by *Thiboutot*. Plainly, the Social Security Act contains an elaborate internal remedial scheme. But the potential for its destruction by § 1983 enforcement was not discussed in *Thiboutot*, even by the dissent. It is difficult, if not impossible, to reconcile this aspect of *Thiboutot* with the Court's pronouncement in *Novotny* and *Brown*.

Exclusivity With Exhaustion

The disruptive consequences of recognizing a § 1983 suit are substantially reduced, if not eliminated, if exhaustion of EAHCA administrative remedies is a prerequisite to a § 1983 suit. In *Patsy* v. *Florida Intern University*, *supra*, the Court of Appeals held that exhaustion of administrative remedies would be required in appropriate cases. Because none of the four traditional exceptions to required exhaustion, as stated in *Patsy*, are present here, there appears to be no reason not to require exhaustion of remedies in compliance with EAHCA. *Id.* at 903-04. The EAHCA thus does not foreclose a § 1983 suit provided *Patsy* exhaustion is a prerequisite to suit.

But if exhaustion of administrative remedies is required under both the EAHCA and § 1983, and, all the proved damages are available under the EAHCA, there is the additional consideration that § 1983 serves no purpose other than that of a conduit for attorneys' fees. It appears that the Tatros, at least until this suit was filed, in no way relied upon a § 1983 claim, unless it is assumed that all of the activity before ARD Committee, the Impartial Due Process Hearing Officer and the administrative appeals were all § 1983 prosecutions because they were required exhaustion steps.

Whatever may be the role of § 1983 where the attack is upon the adequacy of procedures themselves, this court sees no role for § 1983 here. Where § 1983 has no greater role than the statute it purportedly "enforces," its citation will not trigger the § 1988 attorney fee provisions. Specifically, this was not "an action or proceeding to enforce a provision of [§ 1983]."

As Justice Powell noted in his *Thiboutot* dissent, "[t]he uses of this technique have not been explored fully." 100 S.Ct. at 2514. But this court has had experience in other contexts with multi-claim litigation where there is a statutory basis for counsel fees only for part of a claim. Whether the descriptive phase be "gravamen" or some other expression of predominance, this court sees no basis for awarding fees when the fee triggering statute plays no role but that of allowing attorney fees.

This court turns now to the question of whether § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 700, *et seq.*, secures a right enforceable either under § 1983 so as to allow recovery of § 1988 attorney fees or by an implied right of action under § 504 so as to allow recovery of fees under 29 U.S.C. § 794a(b).

With the EAHCA, our primary focus was upon remedial exclusivity, the second *Pennhurst* inquiry. That focus shifts here to the first inquiry, whether the general proscription of § 504 imposes an obligation upon Texas, enforceable by a Texas citizen—a question logically antecedent to whether there is an implied right of action or whether its "obligation" is enforceable by 42 U.S.C. § 1983.[28]

This question is controlled by *Pennhurst State School and Hospital* v. *Halderman*, *supra*, where the court construed the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010. The Court held that Congress must express clearly its intent to impose obligations upon the states when it acts under its spending power—"if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* at 4367. Because the lower courts had almost uniformly held that § 504 is enforceable by an implied right of action, and because the Congress, by passage of § 794a(b), authorized attorney fees, there has been little need

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[28] Therefore, this court will not dwell upon the relationship between § 1983 and § 504 in the context of attorney fees. If there is a right secured after *Pennhurst*, § 794a(b) explicitly authorizes attorney fees.

to press § 1983 as the procedural expression for § 504 violations. And in *Tatro* v. *Texas*, *supra*, the Court of Appeals found that the Tatros have rights secured under § 504 and an implied right to enforce them.

The Court in *Pennhurst* referred to § 504 in illustrating the failure of the lower court "to recognize the well-settled distinction between Congressional 'encouragement' of state programs and the imposition of binding obligations on the States." 49 U.S.L.W. at 4370. The Court continued:

> Relying on that distinction, this Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), rejected a claim that § 504 of the Rehabilitation Act of 1973, which bars discrimination against handicapped persons in federally funded programs, obligates schools to take affirmative steps to eliminate problems raised by applicant's hearing disability. Finding that "state agencies such as *Southeastern* are only 'encouraged' . . . to adopt such policies and procedures,' " *Id.* at 410 (quoting the Act), we stressed that "Congress understood that accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.* at 411. Likewise in this case, Congress was aware of the need of developmentally disabled persons and plainly understood the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it.

Id.

This court makes no pretense that it comprehends the intended reach of the quoted language. In *Southeastern*, the Court expressly reserved the question of enforcement by an implied right or action under § 1983. 442 U.S. 397, 404 n.5.

The Circuit's holding in *Tatro* v. *Texas*, *supra*, is binding upon this court unless plainly undermined by the later decided *Pennhurst*. This court and the Court of Appeals obviously differ on the reach of *Southeastern*. Moreover, another panel of the Court of Appeals reached a result contrary to the view of this court in *Camenisch* v. *University of Texas*, 616 F.2d 127

(5th Cir. 1980), *vacated*, 49 U.S.L.W. 4468 (1981). The Supreme Court's remand of *Camenisch* left the question unresolved because it did not address the merits of the § 504 issues.

This court remains unconvinced as to the applicability of § 504; its views reinforced by *Pennhurst*. Yet, there is no intervening decision speaking with sufficient clarity to allow this court to take a course different from that of the Court of Appeals. This court's conscience is to follow the law; and *Camenisch* and *Tatro* are the law of this Circuit until they are overturned by the Supreme Court. For these reasons of institutional order, this court finds that 29 U.S.C. § 794a(b) authorize an award of reasonable attorney fees to plaintiffs. It turns now to their amount.

Awarded Attorneys' Fees

Plaintiffs request attorneys' fees of $30,000 and expenses of $2,314. Craig Enoch, attorney for plaintiffs, testified that approximately 334 hours of attorney time were devoted to this case up to the January trial. This court estimates that the trial necessitated an additional twelve hours.[29] Enoch also testified that 145 hours of law clerk time were used in preparation. Plaintiffs contend that the attorney time should be billed at $90 an hour, and the law clerk time at $45 an hour.

In determining a reasonable fee, this court looks to the twelve factors identified in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as further explicated in *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575 (1980). Those factors are:

(1) The time and labor required;

(2) The novelty and difficulty of the questions;

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[29] Enoch also testified that 64.4 hours were devoted to this case after this court entered its Interim Order. For the reasons stated above, no attorneys' fees will be awarded for those hours.

(3) The skill requisite to perform the legal service properly;

(4) The preclusion of other employment by the attorney due to acceptance of the case;

(5) The customary fee;

(6) Whether the fee is fixed or contingent;

(7) Time limitations imposed by the client or the circumstances;

(8) The amount involved and the results obtained;

(9) The experience, reputation, and ability of the attorneys;

(10) The "undesirability" of the case;

(11) The nature and length of the professional relationship with the client; and

(12) Awards in similar cases.

Johnson, at 717-19.

As noted in *Copper Liquor*, at 583, "recent decisions . . . suggest that district courts, in computing attorneys' fees, should pay special heed to *Johnson* criteria numbers (1) the time and labor involved, (5) the customary fee, (8) the amount involved and the results obtained, and (9) the experience, reputation, and ability of counsel."

At the outset, it must be noted that Enoch is relatively inexperienced. At the time of the initiation of this dispute, Enoch had been practicing for approximately three and a half years, and had been a member of the federal bar for only two and a half of those years. During that time he had accumulated virtually no experience as a civil rights counsel, and had only limited experience in federal litigation. Although it is improper to penalize an attorney for his recent admission to the bar, *see Johnson* v. *Georgia Highway Express, Inc.*, *supra*, at 719, the *Johnson* factors nevertheless require this court to consider the experience, reputation, and ability of counsel.

Enoch testified that he believes $90 an hour to be a reasonable and customary fee. This court concurs that such an hourly rate is appropriate and reasonable for an attorney experienced in civil rights actions of this general nature. This court has reservations, however, at reimbursing a relatively inexperienced lawyer at such a rate.

Enoch submitted time records indicating the hours spent on briefing, trial preparation and other services. Upon reviewing those records, this court concludes that the time devoted by Enoch to this case was greater than that which would have ordinarily been required by an attorney with experience in civil rights and federal litigation.[30] As such, this court believes

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[30] The following items are illustrative of why this court believes the amount of billed time to be excessive: (1) From October 4 to October 12, 1980, plaintiffs' attorneys spent over seventeen hours preparing and filing the original complaint and request for injunctive relief. That document consists of little more than lengthy citations from the relevant statutes and a recitation of the essential facts. Plaintiffs at that time already had completed three levels of administrative review, and were intimately familiar with the facts and applicable law. (2) From October 24 to November 8, 1979, plaintiffs' attorneys needed approximately fourteen hours to prepare both a motion to amend the complaint and the amended complaint. The motion to amend, which cited virtually no law, and was two and a half pages long, requested this court to permit plaintiffs to join the Texas Education Agency, Commissioner Bowen, and the individual members of the involved Boards. The amended complaint was a duplicate of the original complaint, with the new parties "pasted in." (3) From December 3 to December 11, 1980, plaintiffs' attorneys required approximately six hours to prepare a six and half page memorandum in opposition to defendants' motions to dismiss. In that memorandum, almost half of which is quotations, plaintiffs cite a total of three federal district court decisions. Most of defendants' contentions already had been raised and briefed earlier in the litigation, and plaintiffs' response essentially was to reassert its previous arguments. In that regard, it is worthwhile noting that defendants did raise some issues—particularly the applicability of *Quern* v. *Jordan*, 440 U.S. 332 (1979)—to which plaintiffs simply did not respond. *See* Memorandum Opinion of December 31, 1980, pages 2-4.

that Enoch's request must be discounted by some factor that reflects his inexperience. Such a determination necessarily is somewhat arbitrary. But on the basis of Enoch's written submissions to and personal appearances before this court, it is this court's conclusion that an appropriate and reasonable hourly rate is in the area of $60 an hour. A contingency factor of 20% is reasonable, bringing the rate to $72 an hour. Multiplying that rate by the hours testified to, plaintiffs are entitled to reasonable attorneys' fees of $24,192.[31]

Plaintiffs' attorneys acknowledged at the trial that their time may appear excessive at first blush. They assert, however, that the complexity of the case required such an investment of time and effort. This court is acquainted with the legal and factual issues raised by this case. Factually, this case is not sufficiently complex to warrant the requested award. The record in this case is relatively straight-forward, and was developed early in the course of the administrative proceedings. With the exception of the permissible time interval between catheterizations, most of the facts necessary for granting injunctive relief were undisputed. Plaintiffs' attorneys are correct in noting that the legal issues here are both complex and novel. But this complexity was not reflected in plaintiffs' attorneys' work. Plaintiffs' attorneys' memoranda and oral arguments were of little assistance to this court in resolving the legal issues raised by this case. The number of hours devoted by plaintiffs' attorneys to this case thus appears to be less the product of any factual or legal complexity than the result of their relative inexperience. I intend no criticism of counsel for lack of experience; the question is compensation and experience is relevant.

Looking to the other *Johnson* criteria, this court finds that plaintiffs' attorneys were not prejudiced by having been pre-

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[31] Plaintiffs' attorneys have billed approximately ten hours spent deliberating with the press. As noted by plaintiffs' own expert witness, plaintiffs request to be reimbursed for this is inappropriate.

cluded from accepting more lucrative employment; that there were time limitations imposed by the circumstances, but that such limitations were not inordinately severe or unusual for federal litigation; that plaintiffs' attorneys do not have a reputation as experienced civil rights and federal litigator,[32] and that the case was not "undesirable." This court also determines that while the money involved here is not substantial, the awarded prospective relief is necessary for Amber's continued well-being. Taking all these factors into consideration, this court finds reasonable attorneys' fees to be $24,192.[33] In addition, plaintiffs will be awarded reasonable attorneys' expenses of $3,039.[34]

Judgment is by separate instrument filed herewith.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
United States District Judge

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[32] Plaintiffs' attorneys initially were retained with regard to the administrative proceedings before the involved Texas agencies.

[33] This court awards an additional $7,200 (100 hours at $72 an hour) if this case is appealed to the Fifth Circuit by defendants.

[34] Considering that a not insubstantial portion of the clerk time was devoted to secretarial type duties rather than legal research, such time is reimbursed as an expense item at the rate at which the clerk was paid, five dollars an hour. *See generally Jones* v. *Armstrong Cork Co.*, 630 F.2d 324 (5th Cir. 1980) (may not bill paralegal time where most of time was in performance of clerical duties).

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-79-1281-G

HENRI and MARY TATRO, et al.,
Plaintiffs,

v.

STATE OF TEXAS, et al.,
Defendants.

AMICUS CURIAE ADDRESSING QUESTIONS RAISED IN ORDER

TO THE HONORABLE UNITED STATES DISTRICT COURT:

As invited in this Court's Order of February 6, 1981, the Texas Medical Association and the Dallas County Medical Society respectfully submit this *Amicus Curiae* brief and request that it be considered by this Honorable Court.

STATEMENT OF INTEREST

The Texas Medical Association is a non-profit corporation organized under the laws of the State of Texas. Its membership consists of approximately 18,500 physicians. The Dallas County Medical Society is composed of physicians practicing in Dallas County, Texas. Its membership consists of approximately 3,000 members. Questions concerning the provision of medical care for patients in Texas by licensed physicians utilizing the skills of qualified nonphysicians are of major interest to these organizations and their members.

ARGUMENT AND AUTHORITIES

The questions raised in the Court's Order of February 6, 1981, are addressed in the sequence of their presentation in that Order.

> ***Question (1)(a).*** **Whether under the Texas Medical Practice Act, *Tex. Rev. Civ. Stat. Ann.*, art. 4495, *et seq.* (Vernon 1978) employees of the school district can only provide CIC (the provision of CIC is described in the attached stipulation from the pretrial order in this case) if they are under the control and supervision of a licensed physician and what the training of such persons must be. These questions include the question of whether to furnish CIC without such supervision would be to engage in the unlawful practice of medicine. *Id.*, art. 4510, 4510a and 4510b. *See also*, art. 4518 V.A.T.S. and Op. Tex. Att. Gen. No. H-1295 (Dec. 28, 1978), H-395 (Sept. 9, 1974).**

Under Texas law, a person is regarded as practicing medicine if he (she) professes to be a physician or surgeon and diagnoses, treats, or offers to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or seeks to effect cures thereof; or does the above acts and charges therefor, directly or indirectly, money or other compensation. (*Tex. Rev. Civ. Stat.*, arts. 4510 and 4510a (Vernon 1976)).

Thus, a person professing to be a physician who treats another for a disease or disorder, such as neurogenic bladder dysfunction using clear intermittent catheterization (CIC), is practicing medicine and must have a license to do so under Texas law. Similarly, a person who treats another for a disease or disorder and charges for that treatment is also practicing medicine and must have a license to do so lawfully.

Both the Dallas County Medical Society and the Texas Medical Association respectfully submit that CIC should not be administered to a patient except when ordered by a physician. It is a treatment used for selected patients with myelodysplasia and neurogenic bladders. (Enrile and Crooks, "Clean Inter-

mittent Catheterization for Home Management in Children with Myclomeningocele," 19 *Clinical Pediatrics*, 743 (Nov. 1980)). Even though patients, parents, and others can be trained to perform the technical aspects of this treatment, this does not affect the judgment that CIC should be performed only under a physicians order. However, classification of CIC as the practice of medicine would not prevent the delegation of such a procedure by a physician to a nonphysician. The delegation of medical tasks by physicians to nonphysicians has been an accepted part of the practice of medicine for years. *Thompson* v. *Texas State Board of Medical Examiners*, 570 S.W.2d 123 (Tex. Civ. App. - Tyler 1978, writ ref'd n.r.e.).

The parties in this case appear to agree that CIC is a procedure which, if provided by school system personnel, would only be provided when prescribed or ordered by a physician. The debate appears to be centered on the fact that physicians can and do delegate this task to others. However, administering the treatment itself by a nonphysician under a physician's order is not the unlawful practice of medicine even if a charge is made for the treatment provided. If providing CIC is not considered to be the unlawful practice of medicine because it is a treatment which the physician can delegate to others, this does not mean that it is a treatment which need not be ordered by a physician. In Texas, a nurse or an unlicensed lay person may not lawfully decide that a treatment such as CIC is needed for a particular condition (diagnose), administer treatment, and "charge therefor, directly or indirectly, money or other compensation" without a physician's direction. (*Tex. Rev. Civ. Stat.*, arts. 4510, 4510a, 4510b (Vernon 1976)).

The definitions of the practice of medicine, nursing, and the other licensed health professions overlap to some extent. This overlapping creates the result that the same act when performed by a nurse under the direction of a physician is considered to be part of the practice of nursing and when performed by a physician is considered to be the practice of medicine.

The Texas Attorney General recognized this result in 1962 when he defined the practice of nursing prior to the inclusion of the definition of professional nursing in what is now commonly referred to as the "Nursing Practice Act," (*Tex. Rev. Civ. Stat. Ann.*, art. 4513 *et seq.* (Vernon 1976 and Vernon Supp. 1980-1981)). This definition formulated by the Attorney General included the following statement recognizing the delegation of medical tasks:

> "Generally speaking, the duty of the nurse is to carry out the medical treatment prescribed by a doctor for his patient." (Tex. Att. Gen. Op. No. WW-1403 (1962))

The practice of nursing is more precisely defined today. (*Tex. Rev. Civ. Stat. Ann.*, art. 4518, sec. 5, (Vernon Supp. 1980-1981)). The statutory definition includes:

> ". . . The administration of . . . treatments as prescribed by a licensed physician . . ."

Thus, nurses can lawfully perform medical functions delegated to them by physicians. When nurses do perform delegated medical tasks, they do so with the knowledge that administering these delegated treatments is part of the practice of nursing and recognized as such in the state statutes defining nursing practice. When performing CIC as ordered by a physician for a particular patient, the nurse is practicing nursing as it is contemplated in the statutes.

Question (1)(b). **The nature and extent of such supervision.**

Once a physician has determined that CIC or any other treatment modality is appropriate for his or her patient, the physician may delegate performance of part or all of the treatment to another. The physician continues to monitor the progress of the patient, making sure that the treatment is being properly performed and is progressing without complication. The treatment, whether performed by the physician, a nurse, a parent, or the patient, is a treatment ordered and monitored by the physician.

The extent of the supervision or control which is proper in cases where CIC is ordered must be determined by each physician in each case, taking into consideration (1) the needs and capabilities of the patient and (2) the training, experience and competence of the individual (parent, teacher, patient, or nurse) who will be monitoring or performing the procedure ordered by the physician. One thing is certain: a patient being provided CIC by nurses, school teachers, or others under a physician's orders will expect that the treatment provided will conform to the same standard of care as would apply if a physician were providing the treatment.

Concerning the physical location of the physician, the following statement made to the Attorney General by the Texas State Board of Medical Examiners in a 1973 Attorney General Opinion Request was referenced with approval in an Attorney General Opinion involving ambulance attendants not in the physical presence of a licensed physician.

> "Unlicensed persons could legally perform acts which would constitute the practice of medicine if such persons were under the reasonable control and supervision of a licensed physician," Tex. Att. Gen. Op. No. H-27 (April 12, 1973)

Several Attorney General Opinions have dealt with the meaning of such terms as "direct" and "on-site" supervision as those terms are used in describing the supervision required of the delegating physicians. Tex. Att. Gen. Op. Nos. C-795 (Dec. 30, 1966) and H-368 (Aug. 12, 1974). The degree of instruction or supervision by the physician was also discussed in a 1978 Attorney General Opinion addressing the scope of lawful practice by nurse midwives:

> "Thus, even if performing an episiotomy or making sutures were held to constitute medical treatment, a registered nurse could provide these services at the doctor's direction . . . The appropriate degree of instruction or supervision by the physician will vary with the nurse's experience and qualifications . . . These qualifications are relevant to a determination of the appropriate degree of

instruction and supervision to be provided by a physician. Tex. Att. Gen. Op. No. H-1293 (1978).

In the case of CIC, the technical aspects of the procedure are not complicated and can be performed successfully by children on themselves after appropriate training (boys by age 8 and girls by age 10). Wyndacle, Oosterlinck and De Sy, "Clean Intermittent Self-Catheterization in the Chronical Management of the Neurogenic Bladder," 6 *European Neurology* 107-110 (1980). Hannigan, in "Teaching Intermittent Self-Catheterization to Young Children with Myelodysplasia," 21 *Developmental Medicine and Child Neurology* 365-368 (1979), describes the successful training by nurses of several five year old children (one boy, three girls) to perform CIC on themselves. Of course, physician supervision and continuous monitoring by parents or nurses is vital to minimize the likelihood and severity of complications and to assure proper maintenance and sterilization of the equipment used.

CIC appears to be a procedure which can be safely performed while neither a physician or nurse is present. CIC can be done safely when a patient or other person is trained to perform it properly and is taught to recognize conditions which should be brought to the physician's attention.

Nonphysicians often care for patients under such circumstances. Even when relatively sophisticated treatment is being provided, nonphysicians are commonly placed in a role of deciding when a physician should be notified or when to institute treatment prescribed by a physician under standing medical orders written after the patient has been examined and diagnosed. The physician need not be present for every treatment ordered. The activities which commonly take place in a cardiac intensive care unit provide an illustrative example of such a situation. In an article by the present Assistant General Counsel of the American Medicial Association, the following is recorded:

> "When the nurse serves in the cardiac intensive care unit, she has the advantage of sophisticated equipment that extends her ability to make evaluations and improves the

> reliability of such evaluations. Her training may be more highly specialized for the tasks she performs in the unit than that of the average physician. When the nurse in the unit institutes treatment measures in emergency situations, she is instituting treatment prescribed by a physician in anticipation that such a contingency might arise." Anderson, "Orderly Transfer of Procedural Responsibilities from Medical to Nursing Practice," 5 *Nursing Clinics of North America* 311-319 at 318-319 (Jun. 1970).

The nurse is not unlawfully practicing medicine in the situation described above. He or she is instituting treatment prescribed under a contingency order and, no doubt, has been placed in that position of responsibility because of demonstrated training, experience, and competence. The same should be true for any nurse, parent, or teacher who performs the CIC for the child. Each should have the necessary training to perform the treatment safely, and to know when the physician should be called.

> ***Question 2.*** **The conditions under which CIC ought to be provided consistently with conservative and sound medical judgment including both technique and with training level of the person administering it.**

CIC should only be provided under the orders of directions of a licensed physician. Just as in any other treatment,

> ". . . a nurse should comprehend the cause and effect of any order a physician instructs to her execution. As nursing education and training have become more sophisticated, and as more medical acts have become technical in nature in that they are repetitive and are performed under controlled circumstances, physicians have delegated to nurses a greater variety of technical procedures. Today, nursing practice encompasses such procedures as the administration of injections intravenously and intramuscularly, the starting of blood transfusions, the performance of diagnostic procedures, and the utilization of complex mechanical devices in the performance of diagnostic and therapeutic procedures." Anderson, "Orderly Transfer of Procedural Responsibilities from Medical to Nursing Practice," 5 *Nursing Clinics of North America* 311-319 at 314 (June 1970).

The performance of procedures by nurses under a physician's order has been called ". . . dependent nursing functions (which) are those performed under the legal orders and direction or supervision of licensed physicians." (See Anderson *supra*, at 314). These functions can be distinguished from recognized independent nursing functions, that is, those performed by virtue of the nurse's education, training, and experience, and which properly reflect the nurse's independent judgment. Such functions might include:

> "(T)he evaluation of a patient's condition for the purpose of determining his ability to care for himself or his requirements for nursing or medical attendance; the observation and reporting of symptoms and reactions; and the application and execution of nursing techniques and procedures. (See Anderson, *supra*, at 314).

The Joint Commission on Accreditation of Hospitals offers a voluntary accreditation mechanism for hospitals which is recognized by the Medicare program for purposes of determining a hospital's eligibility for participation. (See Commerce Clearing House *Medicare and Medicaid Guide*, "Conditions of Participation for Hospitals," para 12,340 (Mar. 1979)). Thus, in the case of nurses performing dependent functions outside the hospital or nursing home setting, it may be helpful to review provisions of the Joint Commission on Accreditation of Hospitals (JCAH) *Accreditation Manual for Hospitals* (1981 Edition) relating to home health services.

The section on "Home Care Services," pp. 57-62 of the JCAH *Manual*, provides in part:

> "Each patient receiving home care services shall be under the care of a physician, and shall be informed as to the identity of the physician primarily responsible for his care. Upon referral to the home care program, each patient shall receive an initial evaluation by a physician or registered nurse acceptable to the home care program, to determine the appropriateness of the patient's health care needs for home care services . . . The provision of all nursing and other therapeutic services provided in the home shall be under the supervision of a physician or

registered nurse employed by the home care program. This individual or a similarly qualified designee shall be available during the operating hours of the program, and shall participate in activities relevant to the professional services provided to the patient, including the level of personnel required." (p. 58)

The JCAH *Manual* further provides that when services are to be provided by individuals or by a participating community agency on an hourly or per-visit basis, a written agreement must be prepared and must specify:

"• The services to be provided . . .

• The manner in which services shall be coordinated, supervised, and evaluated by the hospital-administered home care program and its staff;

• The role of the hospital, the participating community agency, and the responsible physician in the establishment of a patient care plan;

• A statement to the effect that the patient care plan will not be altered unilaterally;

• The submission, within one week after each service/visit, of appropriate documentation (such as progress notes) of services provided;

• The participation in case conferences . . .

• The term of the agreement or contract, and the basis for its termination or renewal." (pp. 58-59)

The JCAH *Manual* also provides that a director of the home health care program shall be designated. The director's responsibilities include written descriptions of the responsibility of physicians and other professionals in the delivery of health services. The JCAH *Manual* also states that:

"Home care services provided through the hospital shall be delivered by personnel who have qualifications and abilities equivalent to those of personnel providing comparable services in the hospital, regardless of whether they are employed by the hospital or assigned by participating community service agencies . . . When the services of volunteers, supportive personnel, or technical assistants

are to be employed in the provision of patient care services, such personnel shall be adequately trained and supervised, and their duties shall be specified in writing.

"The medical staff shall assure that the quality of care provided to home care patients is comparable to that provided to inpatients, ambulatory care patients, and emergency care patients. The medical staff may, consistent with hospital policy, designate one or more physicians to carry out this responsibility, or such responsibility may be a function of one of the committees of the medical staff. When the activites of a medical director employed by the home care program on a full-time or part-time basis include clinical responsibilities, he must have achieved and maintained medical staff membership through the same procedures provided for all medical staff members. Physician advice and/or consultation must be available to the home care program staff at all times. (pp. 59-60)

If a physician is not a member of the hospital's medical staff and requests the services provided by the home care program, a special procedure to credential that physician is provided, including a provision for evaluating the care provided to that physician's patients. (p. 60)

Written policies and procedures are required on the delegation of responsibility, as well as the "scope of services to be offered and the manner in which they are to be provided." (p. 60) These must be approved by the hospital's medical staff, administration, and governing body. (p. 60) A written patient care plan that conforms with the physician's orders must be developed for each patient, (p. 61) An "accurate medical record" shall be maintained which shall include progress notes including:

"a description of signs, symptoms; treatment, service, or medication rendered; patient reaction; any change in the patient's condition; and any patient/family instruction given." (p. 61)

Coordination and evaluation of patient services on a continuing basis are encouraged in this section. The "patient care plan" must be

> "reviewed and evaluated as often as the patient's condition required, but not less than once every 60 days." (p. 62)

Some of the extensive requirements which now exist for those hospitals seeking accreditation by the JCAH when they provide home care programs have been described. Should schools begin providing similar services under a physician's order, a similar mechanism will likely evolve. To assure that the treatment provided by the school will be provided safely, proper coordination of activities and delineation of responsibilities will be necessary. If history is any guide, should schools be required to provide treatment as ordered by a pupil's physician, the JCAH or some other accrediting body will be called upon to develop standards for administration of such treatment. These standards will then be recognized by Congress in legislation and will serve as a reference point for evaluating eligibility for federal funding.

> ***Question 3.*** **Any additional questions believed to be presented by this case that impact the practice of medicine or the medical community's role in providing children necessary maintenance while participating in their individual education program.**

One question presented by this case concerns the direction by a physician of an act to be performed by a nurse or another trained person. If the physician is providing instruction not to a particular individual, but to an unidentified person selected in an organized system such as exists in a hospital, nursing home, or other organized setting, such an instruction may be proper and consistent with Texas law. The physician may reasonably rely on an existing system to assure that only those who are capable of carrying out his instructions do so. In such a situation, the physician is not necessarily liable for the acts of those carrying out his directions if the person to whom responsibility is delegated is selected by another upon whose judgment the physician can reasonably rely.

In an Amarillo case, a sponge had been left in the abdominal cavity of a patient during surgery. The patient sued the surgeon and the hospital which employed the nurses involved in the procedure.

The jury's verdict absolved the operating surgeon of any negligence of his own. The jury did find negligence on the part of the operating room nurses who were hospital employees, but declined to find that these employees were "borrowed servants" of the surgeon. On this verdict the trial court rendered judgment against the hospital only, not against the surgeon.

The Amarillo Court of Civil Appeals, in reviewing the trial court decision, reversed the judgment of the trial court and held the surgeon liable for the nurses' negligence under the "captain of the ship" doctrine. (*Worley Hospital* v. *Caldwell*, 529 S.W.2d 639 (Amarillo Civ. App. 1975)). On appeal the Texas Supreme Court set aside the Ararillo appeals court's judgment and remanded the case back to that court. (*Sparger* v. *Worley Hospital*, 547 S.W.2d 582 (Tex. 1977)).

The Texas Supreme Court noted that an employee of one employer may be the borrowed servant of another under Texas law. (See *Sparger* v. *Worley Hospital*, *supra*, at 583). The right to control is ordinarily a question of fact for the jury to decide. In this case the Supreme Court concluded that physicians should be subject to the usual rules applicable to borrowed servants. It held that the heavy burden of vicarious liability imposed by the "captain of the ship" doctrine as it has come to be applied in professional liability actions should no longer be applied in Texas. (*Sparger* v. *Worley Hospital*, *supra*, at 585).

The Supreme Court mentioned that in this case the nurses were assigned to the operating room by the hospital, their employer. The duties of the nurses were detailed in the hospi-

tal's Policy and Procedures Manual. Specific duties were assigned by the hospital to each nurse:

> "The procedures for the sponge count were intended for use regardless of the surgeon who was to perform the operation . . ." *Sparger* v. *Worley Hospital*, *supra*, at 586).

The physician was "in charge, medically speaking, of the nurses" (*Worley Hospital* v. *Caldwell*, 552 S.W.2d 534 at 535 (Tex. Civ. App. - Amarillo 1977)). Testimony at trial demonstrated that the physician had the right to control the nurses assigned to the operating room and in fact did direct them to take a second sponge count as the wound was being closed. (See Justice Johnson's opinion, dissenting from the opinion of the Supreme Court, 547 S.W. at 586-589). However, this degree of control did not persuade the appeals court on remand that the jury's refusal to find that the nurses were the borrowed employees of the doctor was against the great and overwhelming weight of the evidence. (*Worley Hospital* v. *Caldwell*, *supra*, 552 S.W.2d at 536).

The Texas Supreme Court in this case found that this physician was not necessarily liable for the acts of those who are selected by another person when those acts are performed under his direction for his patient. The right of the hospital to assign their employed nurses and determine their qualifications was not questioned.

Thus, a home health care agency, nursing home, or hospital with an estabished system to assign qualified persons to carry out a physician's instructions can properly select the agent to carry out the orders of a physician. However, when no such system exists, the physician may be held to have improperly delegated a treatment unless he selects specific individuals to carry out his treatment orders.

On November 21, 1980, an Attorney General Opinion was issued addressing the delegation of functions by a physician to an optician outside the physician's office. (Tex. Att. Gen. Op. No. MW-275 (Nov. 21, 1980)). The Attorney General opined

that a physician's orders in such a situation must be directed to a particular optician or opticians and cannot lawfully be delegated to an unnamed optician of the patient's choice. The Attorney General reasoned:

> "Where a physician delegates a medical task to another person, he must provide adequate instruction consistent with that person's skill and knowledge . . . Since opticians are not licensed in Texas, he (the physician) cannot rely on a particular level of ability in the profession." (p. 2)

The Opinion also states that the delegation by a physician must be to a natural person, not to a corporation or other group since:

> ". . . only natural persons can be subject to the control or supervision of the physician." (p. 3)

The Opinion concludes that the physician is legally liable for the negligence of the optician in performing services under his direction.

However, in this case the Attorney General was faced with a fact situation of unlicensed opticians in Texas. Since no particular minimum level of ability of these unlicensed persons exists, the Attorney General could only conclude that the physician must delegate to a particular optician or opticians, and provide instructions appropriate to the ability of particular persons. Therefore, although this Attorney General Opinion concluded that physicians can only delegate properly to designated natural persons in the fact situation before him, there is no reason to believe that the Attorney General intended to suggest a change in the common practice of delegation to undesignated nurses and others in hospitals, skilled nursing homes, and home health care agencies. These individuals typically are assigned duties by the organizations which employ them under systems designed to assure that only competent persons carry out any physician's order.

If an institution such as a school has no system to assure that only qualified individuals will carry out a physician's order, we respectfully submit that the physician would be required to

tailor his instructions to the individual who would carry them out just as the Attorney General concluded in MW-275, *supra*. The physician would need to satisfy himself that the individual who is to perform the task would be qualified to do so and that his instructions were sufficient to match the individual's training. On the other hand, if the school has in place of a mechanism to assure safe delivery of the treatment prescribed and proper coordination of activities and responsibilities such as is described in the JCAH *Accreditation Manual for Hospitals* (1981) for home health services, the physician would be able to reasonably rely on the mechanism available and could tailor his instructions to a pre-established level of training for a person to be designated by the school system.

CONCLUSION

All parties in this litigation appear to support the view that diagnosing a patient's condition and concluding that CIC treatment is appropriate are functions which only licensed physicians should perform. The Texas statutes support this view. However, consistent with this view is the accepted practice in Texas of nonphysicians performing acts which, if performed independent of a physician, would constitute the unlawful practice of medicine, but when performed under a physician's direction, are considered to be lawful and proper.

The extent to which a physician may properly delegate medical treatment to a nonphysician is conditioned in each case by the needs of the patient and by the experience and training of the nonphysician to perform the functions delegated. The Nursing Practice Act contemplates such a delegation of dependent nursing functions. The physician need not be physically present during administration of all treatments. The physician should, however, monitor the treatment rendered even though some of the treatment might be simple enough that children can perform certain technical aspects on themselves. The potential for harm, should all the steps in treatment not be adhered to or should an adverse reaction occur, warrants overall physician supervision of the treatment provided.

If a school system undertakes to provide CIC to its pupils under a physician's supervision, the responsibility for daily administration of CIC treatment will be delegated by the physician either (1) to persons the physician reasonably believes are capable of discharging them in a competent manner, or (2) to an organization which has in place a mechanism to assure safe delivery of the treatment prescribed. In either case, the physician would tailor his instructions to the individual providing the care or would write orders for those selected by the school system to provide the treatment based on a pre-established level of training for those individuals.

DALLAS COUNTY MEDICAL SOCIETY AND
TEXAS MEDICAL ASSOCIATION

/s/ By Durwood E. Neal, M.D.
DURWOOD E. NEAL M.D., President
Texas Medical Association

/s/ By Joseph C. Ogle, M.D.
JOSEPH C. OGLE, M.D., President
Dallas County Medical Society

/s/ By Richard Gray, Jr.
RICHARD GRAY, JR.
THOMPSON AND KNIGHT

/s/ By Donald P. Wilcox
DONALD P. WILCOX, General Counsel
Texas Medical Association

/s/ By Michael G. Young
MICHAEL G. YOUNG, Staff Attorney
Texas Medical Association

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-79-1281-G

HENRI and MARY TATRO, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY 26 1981
JOSEPH VICEROY, JR, CLERK

By ????
Deputy

JUDGMENT

In accordance with the accompanying Memorandum Opinion, it is ORDERED, ADJUDGED AND DECREED that the State Board of Education and the Irving Independent School District modify the Individual Education Program of Amber Tatro to include the provision of Clean Intermittent Catheterization in accordance with and as prescribed by a valid medical prescription provided by Amber Tatro. It also is ORDERED, ADJUDGED AND DECREED that plaintiffs recover of the Irving Independent School District their damages and reasonable attorneys' fees and expenses in the sum of

$28,502, plus interest on such sum from the date of judgment until finally paid at the rate of 9% per annum. Court costs are taxed against defendants.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
United States District Judge

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Deputy

MEMORANDUM OPINION

Defendant Irving Independent School District ("school district") has moved to amend the Memorandum Opinion and Judgment entered May 26, 1981. Upon reviewing the motion, this court makes the following amendments. The motion is DENIED in all other respects.

I.

This court finds that of the 336 billable hours devoted to this case by plaintiff's counsel, 62 hours were devoted to the administrative proceedings provided by defendants pursuant to 20

U.S.C. § 1415, and 33.6 hours were devoted to the issue of compensatory damages.[1]

II.

The school district asks this court to hold the State Board of Education liable for plaintiffs' damages and attorneys' fees. As explained in the Memorandum Opinions of December 31, 1980, and May 26, 1981, the Eleventh Amendment immunity of the State Board of Education precludes any award of compensatory damages. The immunity is not applicable, of course, to reasonable attorneys' fees awarded pursuant to 28 U.S.C. § 1988. *See Familias Unidas* v. *Briscoe*, 619 F.2d 391, 406 (5th Cir. 1980). This court did not, however, award attorneys' fees under § 1988, to which it held plaintiffs to be unentitled, but awarded the fees under § 505 of the Rehabilitation Act of 1973, 29 U.S.C. § 794a.[2]

This court held in its Memorandum Opinion of December 31, 1980, that § 504 of the Rehabilitation Act does not abrogate the Eleventh Amendment immunity of the States. *See Jones* v. *Illinois Dep't of Rehabilitation Services*, 504 F.Supp. 1244, 1257-58 (N.D. Ill. 1981); *Stubbs* v. *Kline*, 463 F.Supp. 110, 115-16 (W.D. Pa. 1976); *cf.*, *Quern* v. *Jordan*, 440 U.S. 332 (1979). The question to be answered here is whether § 505 abrogates that immunity as to attorneys' fees.

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[1] Plaintiffs' counsel testified that *no more than* 10% of his time was devoted to compensatory damages. This court construes his testimony as stating that approximately 10% of his total billable hours (336 hours) was devoted to compensatory damages. If this court's construction is incorrect, plaintiffs' counsel is to file an appropriate affidavit within ten (10) days of this Opinion.

[2] The section provides in pertinent part:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

29 U.S.C. § 794a(b).

The starting point of any analysis of the applicability of the Eleventh Amendment immunity to attorneys' fees provisions is *Hutto* v. *Finney*, 437 U.S. 677 (1978). In *Hutto*, the Supreme Court held that States cannot assert the Eleventh Amendment to defeat the attorneys' fees provision of 42 U.S.C. § 1988. The Court's reasoning rested on two pillars.[3] First, the Court noted that § 1988 imposes attorneys' fees "as part of the costs." *Id.* at 695. Costs can be taxed against a State regardless of its immunity. *Id.* at 696-97. The Court concluded that by authorizing attorneys' fees as an item of cost, Congress brought attorneys' fees under the judicially created "litigation costs" exemption to the Eleventh Amendment. *Id.* at 697-98.[4]

The second pillar was Congress' intent that the States be subject to the attorneys' fees provision. *Id.* at 694, 698 n.31. As noted by the Court, "Congress considered and firmly rejected the suggestion that States should be immune from fee awards." *Id.* at 698 n.31.

Over time, it is the second pillar—the existence of congressional intent to subject the States to § 1988 attorneys' fees awards—that appears to have become the primary analytical foundation laid by *Hutto*. Thus, in *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 737-39 (1980), the Court held that although Congress intended to abrogate the Eleventh Amendment immunity, there was no similar indication that Congress intended § 1988 to overcome

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[3] The State defendants did not act in bad faith or violate a judicial decree. The portion of *Hutto* upholding an award of attorneys' fees as "ancillary" remedial relief, therefore, is inapplicable to this case. *See* 437 U.S. at 698-93.

[4] As this court reads *Hutto*, the authority to tax costs against State litigants derives from some sort of inherent constitutional power of the federal judiciary that may be redefined or even eliminated by Congress. 437 U.S. 695-98. The Court was somewhat equivocal, however, on precisely where it found this power. *Id.* at 696 n.25 (citing § 254 of the Judicial Code); *see also* 28 U.S.C. §§ 1911, 1913, 1920.

legislative immunity. The Court made no mention of the alternative holding in *Hutto* that attorneys' fees are part of recoverable costs. *See also New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 67 (1980). In *Maher* v. *Gagne*, 448 U.S. 122 (1980), the Court was faced with the issue of whether attorneys' fees may be awarded pursuant § 1988 for a purely statutory, non-civil-rights violation. *Id.* at 130-33. The Court did not, however, reach the question. It held that although no constitutional violation had been found, because the plaintiffs' *allegation* of a Fourteenth Amendment violation had been sufficiently colorable to maintain federal jurisdiction, the awarded fees fell within Congress' § 5 power to enforce the guarantees of the Fourteenth Amendment. *Id.* Only in footnote did the Court mention that Congress may define "costs" to include reasonable attorneys' fees. *Id.* at 131 n.14; *see also Maine* v. *Thiboutot*, 488 U.S. 1, 9 n.7 (1980). Similarly, in *Familias Unidas* v. *Briscoe*, *supra*, at 406, the Fifth Circuit, in explaining why the Eleventh Amendment does not bar an award of § 1988 attorneys' fees against the Texas State Board of Education, cited *Hutto* for the proposition that Congress abrogated the immunity pursuant to its plenary powers under § 5 of the Fourteenth Amendment. As in *Supreme Court of Virginia*, no mention was made of Congress' redfinition of recoverable costs. In *Corpus* v. *Estelle*, 605 F.2d 175 (5th Cir. 1979), in holding that the Eleventh Amendment waiver applies to cases pending at the time § 1988 was enacted, the Circuit propounded at some length on Congress intent to abrogate the immunity, with virtually no discussion of Congress' power to define taxable costs.

Unlike § 1988, it is not at all clear that Congress focused directly on the question of State liability when it enacted § 505 of the Rehabilitation Act, or that it firmly rejected a suggestion that States should be immune from fee awards. None of the three Committee Reports make any direct reference to State immunity. *See S. Rep. No.* 95-950, 95th Cong., 2d Sess. 18-20 (1978); *H. R. Rep. No.* 95-1149, 95th Cong., 2d Sess. 21 (1978); *H. R. Rep. No.* 95-1780 (Conferences Report), 95th

Cong., 2d Sess. 93 (1978) (latter two Reports reprinted in [1978] *U.S. Code Cong. & Ad. News* 7312). That is not to say, however, that there is no indication of congressional intent. In giving his understanding of the attorneys' fees provision in the Senate bill, Senator Cranston made the following remark:

> [W]ith respect to State and local bodies, or State and local officials, attorney's fees, similar to other items of cost, would be collected from the official, in his official capacity from funds of his or her agency or under his or her control; or from the State or local government—regardless of whether the such agency or Government is a named party. The authorization of attorney's fees under proposed section 505(b) in cases brought to enforce title V is within the power of Congress under among other things, section 5 of the 14th amendment. Thus, in accordance with the Supreme Court's decision in *Hutto* v. *Finney*, No. 77-1660, June 23, 1978, the 11th amendment is no bar to the recovery of attorney's fees under proposed section 505(b) from State government as a result of an action or proceeding to enforce or change a violation under title V of the Rehabilitation Act of 1973.

124 *Cong. Rec.* S15,591 (daily ed. Sept. 20, 1978). These sentiments were echoed by Senator Stafford, ranking member of the Senate Subcommittee on the Handicapped and chief cosponsor of the Senate bill, in his discussion of the Conference bill. 124 *Cong. Rec.* S19,000 (daily ed. October 14, 1978).

A court may not conclude that Congress intended to abrogate the State's Eleventh Amendment immunity unless it finds a clear statement of legislative intent to that effect. *See Quern* v. *Jordan*, *supra*, at 340-45. These remarks by two Senators, isolated from any real debate on the issue, do not, by themselves, meet that test. But in the context of *Hutto* v. *Finney*, *supra*, and with the presumption that Congress understood the significance of its languge when it made the award of reasonable attorneys' fees a part of recoverable costs, this

court concludes that the Eleventh Amendment does not bar a § 505 award of attorneys' fees against State defendants.[5]

In that plaintiffs obtained injunctive relief against the State Board of Education, the Judgment will be amended to make the Board jointly and severally liable for plaintiffs' reasonable attorneys' fees.

III.

The school district suggests in its motion that plaintiffs did not establish a § 504 violation because they failed to show that Amber Tatro was excluded from a school district program or activity receiving federal financial assistance. *See Brown* v. *Sibley*, 650 F.2d 760, 766-71 (5th Cir. 1981).

As this court noted in its earlier Memorandum Opinion:

> As for the school district's earlier suggestion that there has been no showing that the school district receives federal funds, the superintendent of the school district

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[5] From time to time, the State Board of Education has contended that it enjoys an absolute judicial or legislative immunity. Arguably, if such immunity exists, the Board may be immune from attorneys' fees awards. *See Supreme Court of Virginia* v. *Consumers Union of the United States, Inc., supra*, at 737-39. But as this court noted in its earlier Memorandum Opinion, the State Board of Education is under a statutory obligation to supervise Amber's Individual Education Program. 516 F.Supp. at 972; *See S-1* v. *Turlington*, 635 F.2d 342, 350 (5th Cir. 1981); *Kruelle* v. *New Castle County School Dist.*, 642 F.2d 687, 696-98 (3d Cir. 1981). In this regard, the Board's role is akin to that of an administrative agency charged with enforcing a statute. As the Supreme Court noted in *Supreme Court of Virginia*, "[f]ee awards against enforcement officials are run-of-the-mill occurrences." 446 U.S. at 739. This court does not, however, hold that the State Board of Education is never entitled to legislative or judicial immunity. It only holds that the awarded injunctive relief goes to the Board's "direct enforcement role," *see id.*, and that the Board thus is unentitled to any judicial or legislative immunity as to the duty it here owes Amber Tatro.

conceded that the school district receives federal funds allocated for special education. 516 F.Supp. at 977, n.17.

This court has reviewed the transcript, and is persuaded that superintendent Townley conceded that the school district receives federal financial assistance for special education.[6] As the record stands, plaintiffs have met their burden of proof. But because Townley's concession arguably is somewhat ambiguous, in the interests of justice this court will consider reopening the record as to the issue if within ten (10) days of this Opinion the school district files an affidavit setting forth the federal funds received and the programs and activities on which such funds are spent. The affidavit is to be accompanied by a legal memorandum dealing with what constitutes a "program or activity" within the meaning of § 504. *See generally Brown* v. *Sibley, supra.*[7]

IV.

An Amended Judgment reflecting this court's amended findings and conclusions is filed herewith by separate instrument.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES DISTRICT JUDGE

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[6] The school district appears to assume that plaintiffs must show that federal funds are allocated specifically for the school district's Early Childhood Development Program. All plaintiffs must show is that Amber was excluded from *any* program or activity receiving federal financial assistance. In this regard, had Amber been enrolled by the school district she would have been entitled to participate in the school district's physical therapy program. *See* 516 F.Supp. at 979. Physical therapy is a type of "special education."

[7] Specifically, the school district is to address the issue of the administrative level at which such funds must be allocated before a person is excluded from a "program or activity." That is, if the school district receives federal financial assistance, is every program or activity provided by the school district a § 504 "program or activity," or must the funds be targeted to the precise types of education Amber would have received by attending the school district?

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-79-1281-G

HENRI and MARY TATRO, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,

Defendants.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
MAY 26 1981
JOSEPH VICEROY, JR. CLERK
By ????????
Deputy

AMENDED JUDGMENT

It is ORDERED, ADJUDGED AND DECREED that the State Board of Education and the Irving Independent School District modify the Individual Education Program of Amber Tatro to include the provision of Clean Intermittent Catheterization in accordance with and as prescribed by a valid medical precription provided by Amber Tatro. It also is ORDERED, ANJUDGED AND DECREED that plaintiffs recover of the Irving Independent School District their damages in the sum of $1,271, and of the Irving Independent School District and the State Board of Education, jointly and severally, their reasonable attorney's fees and expenses in the sum of

$27,231, plus interest on such sums from May 26, 1981, until finally paid at the rate of 9% per annum. Court costs are taxed against defendants.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.
April 25, 1983.

NO. 81-1454.

Henri and Mary TATRO, Individually,
and as Next Friend of Amber Tatro, A Minor,
Plaintiffs-Appellees, Cross-Appellants,
v.

The STATE OF TEXAS, *et al.*,
Defendants,

State Board of Education,
Defendant-Appellant,

The Irving Independent School District,
Defendant-Appellant, Cross-Appellee.

Parents of handicapped child brought action seeking injunction requiring school district to provide child with special services and to recover compensatory damages and attorney fees. The United States District Court for the Northern District of Texas, Patrick E. Higginbotham, J., 481 F.Supp. 1224, denied preliminary injunction and appeal was taken. The Court of Appeals, 625 F.2d 557, vacated and remanded. On remand, United States District Court for the Northern District of Texas, Patrick E. Higginbotham, J., 516 F.Supp. 968, entered injunction requiring school district to provide child with requested special services and authorized award of reasonable attorney fees to parents, and school board appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) clean intermittent catheterization required for handicapped child was "related service" within meaning of Education of All Handicapped Children Act; (2) school district was required to provide handicapped child with clean intermittent catheterization;

(3) injunction requiring state board to act in supervisory capacity to assure that handicapped child's individual education program conformed to Act was proper; and (4) state board's violation of Rehabilitation Act supported award of attorney fees.

Affirmed.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN, GEE and JOLLY, Circuit Judges.

GEE, Circuit Judge:

This is Amber Tatro's second appearance before this court. The facts and procedural history of her case are reported in detail in our prior opinion, 625 F.2d 557 (1980) *(Tatro I)*, and in those of the district court. 516 F.Supp. 968 (1981); 481 F.Supp. 1224 (1979). To aid the reader, we will briefly summarize them here. Amber is a seven year old girl afflicted with myelomeningocele, a birth defect commonly known as spina bifida. As a result of this handicap, she suffers from speech and orthopedic impediments and a neurogenic bladder. Because this last condition prevents voluntary emptying of the bladder, Amber must be catheterized several times daily to prevent injury to her health. The method chosen by Amber's doctors, the most widely accepted procedure, is Clean Intermittent Catheterization ("CIC").

In early 1979, when Amber was three and one-half years old, her mother asked the Irving Independent School District ("school district") to provide special education for Amber. The school district agreed, and in a series of meetings with the Tatros, developed an Individual Education Program ("IEP") for Amber as required by the Education of All Handicapped Children Act ("EAHCA"), 20 U.S.C. §§ 1401(19), 1414(a)(5) (1976). The IEP provided for Amber's placement in the school district's Early Childhood Development ("ECD") classes and for the provision of various other services to Amber, including physical and occupational therapy. The IEP did not provide for

CIC and the school district maintained that it had no legal obligation to administer it.

Amber's parents next pursued an administrative appeal from the school district's decision not to provide CIC. *See* 20 U.S.C. § 1415 (1976) (setting out procedures). Pursuant to 20 U.S.C. § 1415(b)(2), an impartial hearing officer conducted a hearing and determined that the EAHCA required the school district to provide CIC. The Texas Commissioner of Education adopted the hearing officer's decision. *Amber T., bnf Mary T. v. Irving Independent School District*, TEA Docket No. 115-SE-579 (August 6, 1979). The Texas State Board of Education ("State Board") reversed the decision of the Commissioner and hearing officer and reinstated the school board's decision not to provide CIC. After thus exhausting state remedies as required by the EAHCA, the Tatros brought the present action in federal district court pursuant to 20 U.S.C. § 1416(e)(2) (1976), naming the school board, the State Board, and others as defendants.[1]

The Tatros contended that the school district violated the EAHCA by failing to provide Amber with a "free appropriate public education," *id.* § 1412(1), which is defined in part as "special education and related services." *Id.* § 1401(18). Specifically, they argued that CIC is a "related service" the state must provide to fulfill its duty to Amber under the EAHCA. The Tatros also argued that the school district's refusal to provide CIC violated section 504 of the Rehabilitation Act of 1973 which prohibits discrimination against the handicapped in federally funded programs. 29 U.S.C. § 794 (Supp. V 1981).

The district court denied the Tatros' motion for a preliminary injunction to require the school board to provide CIC. 481 F.Supp. at 1229. That court concluded that CIC is not a "re-

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[1] All defendants save the school board and the State Board were dismissed by the district court, 516 F.Supp. at 972-73; the Tatros do not contest these dismissals. The propriety of the State Board's action is discussed in Part III, *infra*.

lated service" within the meaning of the EAHCA because the need for it does not arise from the effort to educate *Id.* at 1227. The district court further concluded that section 504's prohibition of discrimination does not impose a duty upon the school board to take affirmative action such as the provision of CIC. *Id.* at 1228-29.

The Tatros appealed from the district court's order, and based upon facts that were assumed for purposes of the appeal, this court reversed. *Tatro I*, 624 F.2d at 558 n. 1, 562. This court held that CIC falls within the literal terms of the statutory definition of "related services," which includes "supportive services . . . as may be required to assist a handicapped child to benefit from special education." *Id.* at 564 (citing 20 U.S.C. § 1401(17) (1976)). Because, under the assumed facts, Amber would be unable to attend ECD classes without provision of CIC during the school day, this court concluded that CIC was essential if she was to benefit from special education, and that CIC was therefore a "related service" in her case. The district court had thought it necessary to limit the statutory language to services arising from the effort to educate in the absence of any evidence of Congressional intent to require provision of life support services through and education statute. 481 F.Supp. at 1227. This court concluded that the district court's limiting construction of the EAHCA's literal language was erroneous because the EAHCA contained its own limitations on the types of life support services falling within the ambit of "related services." 625 F.2d at 562. This court further held that the school district's refusal to provide CIC violated section 504.

I. THE EAHCA CLAIM

Were we writing on a clean slate, we would share the district court's reluctance to read a statute designed to aid education to require provision of medical necessities of life which are required by a child whether or not she participates in the state's educational program. Nevertheless, *Tatro I* is the authoritative interpretation of the EAHCA in this circuit, and under "law of the case" principles, must be followed by us in this

subsequent appeal "unless (1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work a manifest injustice," *White* v. *Murtha*, 377 F.2d 428, 432 (5th Cir.1967) (footnote omitted; enumeration added); *see Goodpasture, Inc.* v. *M/V Pollux*, 688 F.2d 1003, 1005-06 (5th Cir.1982); *United States* v. *McClain*, 593 F.2d 593 F.2d 658, 664 (5th Cir.), *cert. denied* 444 U.S. 918, 100 S.Ct. 234, 62 L.Ed.2d 173 (1979). None of these considerations justifies departure from *Tatro I* by this panel.

Although we perhaps would have taken a different view of the EAHCA upon de novo consideration, we cannot say that the well-documented *Tatro I* decision was not also a principled interpretation of that undeniably Delphic statute. It is not clearly erroneous and certainly does not work manifest injustice. Further, neither the parties' briefs nor our own research has revealed any supervening authority.[2] Thus, the only remaining issue under the EAHCA in this case is whether the evidence adduced on remand from *Tatro I* is so different from the assumed factual basis for that decision that its legal conclusions no longer apply. The school district argues that such is the case.

Tatro I did not hold that all life support services are "related services" under the EAHCA, nor that school districts must

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[2] The school district argues that after *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), federal statutes that grant funds to state programs cannot be read to confer judicially enforceable substantive rights on the programs' beneficiaries. This argument misreads *Pennhurst*, which only requires that funding statutes must by their terms create such rights. That the EAHCA creates enforceable rights to "special education and related services" was clearly established in *Board of Education* v. *Rowley*, ___ U.S. ___, 102 S.Ct. 3034, 3048-49, 73 L.Ed.2d 690 (1982). The issue in the present case is the scope of those rights.

always provide CIC to children who need it. Derived from the statute and its regulations were three conditions that must obtain before a school board must provide services such as CIC:

> first in order to be entitled to any related services at all, a child must be handicapped so as to require special education. 45 C.F.R. § 121a.14 (1979) (comment one); *see* 20 U.S.C.A. § 1401(1). . . . Second, the life support service must be necessary to aid a handicapped child to benefit from the special education to be provided. *See id.* § 1401(17). Thus, a life support service would not be a related service if it did not have to be provided during school hours, but instead could be performed at some other time. Third, in order to be a related service, the life support service must be one which a nurse or other qualified person can perform. 45 C.F.R. § 121a.13(b)(10) (1979). Excluded from the term "related services" are those health-related activities which must be performed by a licensed physician that are not provided "to determine a child's medically related handicapping condition which results in the child's need for special education and related services." *Id.* § 121a.13(4). Thus, even under a literal interpretation of the statutory definition, the types of life support services needed by a child which can be related services are limited.

625 F.2d at 562-63 (footnotes omitted).

All parties agree that Amber is handicapped and in need of special education. The school district argues that the district court erred in finding the other two *Tatro I* conditions met in this case. It is argued first that under Texas law, CIC may not be performed by a nurse or other qualified person unless a physician is physically present to control and supervise the procedure. The argument concludes that such participation by a physician transforms CIC into "medical treatment" which the school district need not provide under *Tatro I*. *Id.* at 563; 20 U.S.C. § 1401(17) (1976) (medical treatment is a related service only if provided for diagnostic and evaluation purposes). The district court, guided by its extensive experience in apply-

ing Texas law, and with the aid of able amicus curiae,[3] rejected the school district's view of state law. 516 F.Supp. at 975-76. We cannot say that the district court was wrong.

As the district court found, it has been long settled that physicians in Texas may prescribe treatment and delegate its administration to others. *Thompson* v. *Texas State Board of Medical Examiners*, 570 S.W.2d 123, 129-30 (Tex.Civ.App.—Tyler 1978, writ ref'd n.r.e.); *McKinney* v. *Tromly*, 386 S.W.2d 564 (Tex.Civ.App.—Tyler 1964, writ ref'd n.r.e.); *see also* Op.Tex.Atty.Gen. No. WW-1403 (1962). Subsequent to the district court's decision on remand, this principle was codified in Texas' new Medical Practice Act:

> a person licensed to practice medicine shall have the authority to delegate to any qualified and properly trained person or persons acting under the physician's supervision any medical act which a reasonable and prudent physician would find is within the scope of sound medical judgment to delegate if, in the opinion of the delegating physician, the act can be properly and safely performed by the person to whom the medical act is delegated and the act is performed in its customary manner, not in violation of any other statute, and the person does not hold himself out to the public as being authorized to practice medicine. The delegating physician shall remain responsible for the medical acts of the person performing the delegated medical acts.

Tex.Rev.Civ.Stat.Ann. art. 4495b § 3.06(d)(1) (Vernon Supp.1982-1983). The Texas Nursing Practice Act defines administration of treatments prescribed by a licensed physician as a "professional nursing act" and hence not unlawful practice of medicine. *Id.*, art. 4518 § 5. However, consistent with the district court's finding, 516 F.Supp. at 976, the new Medical Practice Act also allows delegation to any qualified person, not

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[3] The joint brief of the Texas Medical Association and the Dallas County Medical Society as amicus curiae is reprinted as an appendix to the district court's opinion on remand. 516 F.Supp. at 987.

only to nurses. The Medical Practice Act goes on to clarify the legal status of a physician's delegatee:

> A person to whom a physician has delegated a medical act to perform is not guilty of practicing medicine without a license unless the person acts with knowledge that the delegation and action thereunder is a violation of this Act.

Tex.Rev.Civ.Stat.Ann. art. 4495b § 3.07(i) (Vernon Supp.1982-1983).

The Medical Practice Act's requirement that a physician supervise those to whom he delegates a medical act has appeared in a number of prior statutes, and has been construed by the Texas Attorney General "not [to] require the constant physical presence of a physician to authorize the performance of professional nursing acts by one not otherwise licensed to perform them, so long as the responsible physician personally assumes control and supervision of the employee or instructs him in what is to be done, and remains reasonably available to see that the nursing acts are properly performed." Op.Tex.Atty.Gen. No. H-395 (Sept. 9, 1974). *See also* Op.Tex.Atty. Gen. No. H-1295 (Dec. 19, 1978) (nurses may administer treatment without direct supervision by doctor); Op.Tex.Atty.Gen. No. H-368 (Aug. 12, 1974) (physical therapy may be administered pursuant to doctor's directions without any requirement of constant physical presence of doctor); Op.Tex.Atty.Gen. No. H-27 (Apr. 12, 1973) (ambulance attendants not in physical presence of doctor may provide emergency care if in telephone communication with him).[4]

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[4] These interpretations remain good law under the Medical Practice Act:

> No substantive changes in prior law or interpretation of prior law have been intended unless expresely done so in this Act. Consistent with this intention, unless expresely provided otherwise in this Act, any previous judicial opinion, attorney general's opinion, board practice, or interpretation is not to be considered modified or declared inapplicable.

Medical Practice Act of 1981, 67th Leg., 1st C.S., ch. 1, § 6(c).

We think the prescription and instructions for CIC that the district court required the Tatros to provide to the school district fulfill the requirements of Texas law and allow school district employees legally to administer CIC to Amber.[5] We have fully reproduced these documents in the margin to emphasize that a shcool district is entilted to require a detailed prescription and instructions tailored to the particular needs of each individual child for whom it is asked to provide health-related services under the EAHCA. It should not be required to exercise medical discretion. The prescription should make clear, as Amber's does, that the child is under the continuing care of the prescribing physician who will monitor the child's continuing need for the services and modify the prescription

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[5] The school district also was provided with the Tatros' written consent to its provision of CIC to Amber. Amber's doctor's prescription was in letter form as follows:

Mr. John Townley
Irving Independent School District
901 O'Connor Rd.
Irving, Texas

Re: C.I.C. instructions for
Amber Tatro—Prescription

Dear Sir:

Amber Tatro has been placed on a schedule of Clean Intermittent Catheterization every three to four hours during the waking day. Amber is to be catheterized at the times listed:

6:30 A.M.	3:30 P.M.
9:30 A.M.	6:30 P.M.
12:30 P.M.	9:30 P.M.

If Amber's diaper is wet at the time for the scheduled catheterization, this should be reported to me or Dr. George Hurt at the Spina Bifida Clinic at The Scottish Rite Hospital as the above schedule may need to be modified.

A qualified school nurse or other qualified person can perform C.I.C. and attached to these instructions are the Scottish Rite Hospi-

accordingly. Further, the prescription should identify the circumstances in which the school district personnel should seek further guidance from the physician. Since in this case the school district has been provided these assurances, we con-

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tal instructions for catheterization of a female which are to be followed.

A # 10 or # 12 catheter should be used to start out.

The above schedule for catheterization and size of catheter may be altered upon the direction of myself or Dr. Hurt from time to time according to Amber's needs.

If there are any questions, I or Dr. Hurt may be reached through the Spina Bifida Clinic at Scottish Rite Hospital.

[The doctor's signature, as experience has taught us to expect, was illegible. The record reveals that Dr. Goldstein signed.]

Name

3/17/81

Date

Attached to the prescription were detailed instructions for administration of CIC:

TEXAS SCOTTISH RITE HOSPITAL FOR CRIPPLED CHILDREN INSTRUCTIONS FOR PARENTS ON CATHETERIZATION OF FEMALE

Purpose:
To completely empty the bladder at scheduled intervals in order to decrease the incidence of urinary tract infection.
Urine that stays stagnant in the bladder is more likely to become infected. A bladder that stays full becomes enlarged and thickened. Scheduled emptying of the bladder allows the patient to become familiar with the difference in the sensation of a full bladder and an empty bladder.

Equipment Needed:
Clean catheter, metal or rubber. (Metal is best since it can be boiled repeatedly without deterioration.)
Soap and water.

cluded that the requirement of *Tatro I* that CIC be a service that a nurse or other qualified person can perform is satisified.

The school district's second argument is that CIC is not a related service in Amber's case because it is not "required to assist [her] to benefit from special education." 20 U.S.C. § 1401(17) (1976); *Tatro I*, 525 F.2d at 563. The school district does not contest the district court's finding, consistent with the facts assumed in *Tatro I*, that CIC is required for Amber to attend the school district's half-day ECD classes. 516 F.Supp. at 977. Rather, it contends for the first time in its reply brief in this appeal that the ECD classes themselves are not necessary for Amber to benefit from special education.

The EAHCA defines "special education" as "specially designed instruction, at no cost to parents or guardians, to meet

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Dish to catch the urine, for example, a re-usable jar.
Large underpad, to prevent soaking bed linens.

General Instructions:

1. Wash hands with soap and water.
2. Get all of the equipment ready.
3. Get child ready. (If possible, put at table height since it is easier to do this procedure at this height.) Place child on her back.
4. Spread labia apart with one hand and wash genitalia with soap and water with the other hand, *always* moving in a downward direction. (*Never* wash in an upward direction since this will move germs from around the rectum up into the area of the bladder opening.)
5. Insert catheter in urethra and let *all* urine drain out of the bladder. This may take longer than you think, so do not remove catheter until the urine has stopped draining.
6. If you are unable to catheterize, contact your local Public Health Nurse or call Texas Scottish Rite Hospital.
7. Discard urine.
8. Clean catheter. Clean with soap and warm water after each use. Allow to dry and place in a clean, dry envelope.

At least once a day after the catheter has been washed with soap and water, place it in a pot of water and boil for 20 minutes. Allow the catheter to air dry and place it in a clean dry envelope.

the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. §1401(16) (1976). The school district contends that before Amber is entitled to CIC, she must allege and prove that she could not benefit from special education provided to her by the school district at home or in another institution where CIC is already being provided. If she could benefit from special education in these alternatives placements, the argument goes, provision of CIC by the school district would not be required to fulfill the requirements of the EAHCA. We cannot agree that the Tatros must make such a showing in this case.

In its first case considering the EAHCA, the Supreme Court recently held that the statute provides a "basic floor of opportunity" consisting of personalized instruction and related services designed to enable handicapped children to benefit from education. *Board of Education* v. *Rowley*, ___ U.S. ___, ___, 102 S.Ct. 3034, 3048, 73 L.Ed.2d 690 (1982). Although the state is accorded wide discretion to choose educational means, *id.* 102 S.Ct. at 3051-52, and need not maximaze each child's potential, *id.* 102 S.Ct. at 3048, the required instruction and related services must meet certain standards. "Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and *must comport with the child's IEP*." *Id.* 102 S.Ct. at 3049 (emphasis added). Similarly, the regulations under the EAHCA require that each handicapped child's placement be based upon his or her IEP. 34 C.F.R. § 300.552(a)(2) & (b) (1982).

The EAHCA provides that each handicapped child's IEP will be jointly developed by the school officials, the child's teacher, his or her parents and, when appropriate, the child. 20 U.S.C. § 1401(19) (1976). The IEP is the educational blueprint that specifies how the child is to be taught, sets goals and determines how progress is to be measured. *Id.; see Helms* v. *McDaniel*, 657 F.2d 800, 802 (5th Cir.1981), *cert. denied* 455

U.S. 946, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982). As such, the IEP is the primary vehicle for implementing the requirements of the EAHCA. In requiring that special education and related services be provided in conformity with a child's IEP, the Supreme Court recognized the central role played by the IEP in a statutory scheme like the EAHCA, which has placed primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parents. *Rowley*, 102 S.Ct. at 1051-52; *McDaniel*, 657 F.2d at 802.

Amber's IEP explicitly calls for her placement in the school district's ECD classes. *See* Plaintiffs' Proprosed Stipulation of Facts, exhibit A. The IEP states that its justification for characterizing this setting as the most appropriate as well as the least restrictive is that "[t]esting indicates the need for [Early Childhood] placement," *Id.* Moreover, the "instructional/learning strategies" established by Amber's IEP include provision for a "structured atmosphere," immediate feedback and "small group instruction," *id.*, all of which are consistent with ECD placement.

We are convinced that the central role of the IEP in the educational scheme contemplated by the EAHCA and in the standard of review developed in *Rowley* gives rise to a presumption in favor of the educational placement estabished by Amber's IEP. Moreover, because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate. Since the school district has not even attempted to do so, its argument must be rejected and we need not reach the thorny issue of what circumstances might call for judicial modification of an IEP. *See Rowley*, 102 S.Ct. at 3051 (setting out general standard of review).[6] In Amber's case, by

[6] We do not place an undue burden on the school district; the IEP is not etched in stone. The EAHCA and its attendant regulations provide for periodic review and modification of IEP's by school

virtue of the provisions of her IEP, the "special education" required by the EAHCA consists of her participation in the school district's ECD classes.[7] Since the district court found as a fact that provision of CIC during the school day is necessary for Amber to attend ECD classes, and since that finding has not been shown to be clearly erroneous, CIC is therefore "required to assist a handicapped child to benefit from special education" and is a "related service" under the EAHCA. 20 U.S.C. § 1401(17) (1976); *Tatro I*, 625 F.2d at 563. The school district must provide it to Amber Tatro.

II. THE SECTION 504 CLAIM AND ATTORNEYS' FEES

The EAHCA does not provide for attorneys' fees awards. The district court awarded attorneys' fees to the Tatros under section 505 of the Rehabilitation Act of 1972, *as amended*, 29 U.S.C. § 794a(b) (Supp. V 1981), which authorizes such awards to prevailing parties in actions to enforce provisions of the

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authorities and parents. 20 U.S.C. §§ 1412(4), 1414(a)(5) (1976); 34 C.F.R. § 300.343(d) (1982).

[7] The school district also asserted in its reply brief that ECD classes are for handicapped students only. The court in *Tatro I* apparently assumed that ECD classes also included nonhandicapped children because it rested its decision in part upon its conviction that Amber's exclusion from ECD classes would violate the "mainstreaming" mandate of the EAHCA. 625 F.2d at 563. The statute requires that "to the maximum extent appropriate," handicapped children will be educated with non-handicapped children, and that removal of handicapped children from regular classes will occur only when their handicaps cannot be accommodated by "supplementary aids and services." 20 U.S.C. § 1412(5) (1976); *Rowley*, 102 S.Ct. at 3049. The record does not clearly establish whether, in fact, the school district's ECD classes are for handicapped students only. However, even if the classes are only for the handicapped, so that the EAHCA's mainstreaming provisions do not require that Amber attend them, we have seen that her IEP does require ECD class attendance. Therefore, under the statute and *Rowley*, so does the EAHCA.

Rehabilitation Act. 29 U.S.C. § 701 *et seq.* (1976). *Tatro I* had held that section 504 of that Act imposed an obligation on the school district to provide CIC to Amber. 624 F.2d at 564-65. The school district now argues that the Supreme Court's subsequent decision in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 57 L.Ed.2d 594 (1981) precludes a finding that section 504 imposed such affirmative duties on state agenices, and that therefore, no Rehabilitation Act violation has been established to support an attorneys' fees award.[8]

In *Pennhurst*, the Supreme Court was asked to decide whether section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010, conferred enforceable substantive rights on the beneficiaries of the Act. In deciding that it did not, the Court referred to *Southeastern Community College* v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), its only major case involving section 504, as illustrating the failure of the lower court.

> to recognize the well-settled distinction between Congressional "encouragement" of state programs and the imposition of binding obligations on the States. . . . Relying on that distinction, this Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 60 L.Ed.2d 980, 99 S.Ct. 2361 (1979), rejected a claim that § 504 of the Rehabilitation Act of 1973, which bars discrimination against handicapped persons in federally funded programs, obli-

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[8] As the district court correctly observed, the question whether Section 504 imposes affirmative obligations on the states is logically antecedent to the question of whether such obligations are enforceable by an implied right of action. 516 F.Supp. at 984. If such obligations exist after *Pennhurst*, there is a private right of action to enforce them in this circuit. *Helms* v. *McDaniel*, 657 F.2d 800, 806 n. 10 (5th Cir. 1981) *cert. denied* 455 U.S. 946, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982); *Baker* v. *Bell*, 630 F.2d 1046, 1055 (5th Cir. 1980); *Tatro I*, *supra* (implicit); *see also Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated as moot*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

> gates schools to take affirmative steps to eliminate problems raised by an applicant's hearing disability. Finding that "state agencies such as Southeastern are only 'encourage[d]' . . . to adopt and implement such policies and procedures," *Id.*, at 410, 60 L.Ed.2d 980, 99 S.Ct. 2361 [2369] (quoting the Act), we stressed [that] "Congress understood [that] accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.*, at 411, 60 L.Ed.2d 980, 99 S.Ct. 2361 [2369].

451 U.S. at 27, 101 S.Ct. at 1544-45, 67 L.Ed.2d at 713 (citation omitted).

Although *Pennhurst* reinforced the district court's doubts that section 504 requires provision of CIC, the court concluded that the Supreme Court had not spoken with sufficient clarity to allow it to depart from prior decisions of this court squarely on point. 516 F.Supp. at 985. As a single panel of the court, we find ourselves similarly constrained. *Tatro I*, binding upon us to the extent that it is law of the case, clearly held that CIC is within section 504's nondiscrimination mandate. 625 F.2d at 564. Moreover, two other panels of our court have held that states must take some affirmative action to provide "services and accomodations" under section 504, notwithstanding the *Davis* decision. *Majors* v. *Housing Authority*, 652 F.2d 454, 457 (5th Cir.1981); *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir.1980). Although *Camenisch*, relied upon in *Tatro I*, was vacated as moot without reaching the merits of the section 504 issue, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981), *Majors* remains good law in our circuit. A recent decision of a sister circuit has reached the same result. *New Mexico Ass'n for Retarded Citizens* v. *New Mexico*, 678 F.2d 847 (10th Cir.1982).

As we have seen, a prior decision does not bind us as law of the case if it is supervened by controlling authority. *White* v. *Murtha*, *supra*. Similarly, the general rule that one panel of our court does not overrule another panel does not prevent us from overriding a prior decision "based entirely on [a] theory"

subsequently rejected by the Supreme Court. *Hanson* v. *Town of Flower Mound*, 679 F.2d 497, 501 (5th Cir.1982). We do not think *Pennhurst* goes so far. In *Majors*, this court recognized that *Davis* generally disapproved of affirmative action requirements under section 504. 652 F.2d at 456. However, the court went on to emphasize the following *caveat* from *Davis:*

> We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial an administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.

Davis, 442 U.S. at 412-13, 99 S.Ct. at 2370; *Majors*, 652 F.2d at 456. This court concluded, as had the panels in *Camenisch* and *Tatro I*, that where a plaintiff, unlike the plaintiff in *Davis*, could receive the full benefits of a state program if reasonable accomodations were provided, refusal to provide them would constitute discrimination and would not fall within the *Davis* affirmative action exception. *Majors*, 652 F.2d at 457-58; *Tatro I*, 625 F.2d at 564; *Camenisch*, 616 F.2d at 132-33; *accord, New Mexico Ass'n for Retarded Citizens, supra.*

Although *Pennhurst* undoubtedly emphasized the component of the *Davis* decision that disapproved judicial recognition of affirmative obligations under section 504, it did not overrule the portion of *Davis* relied upon in our earlier decisions. *Pennhurst* therefore forms an insufficient basis upon which to justify a departure from prior law by this panel.

The school board's additional objections to its liability under section 504 are groundless and merit little discussion. The district court found that given our prior decision that refusal to provide CIC is discriminatory under section 504, Amber had been thereby excluded from a "program of activity receiving federal financial assistance." 29 U.S.C. § 794 (Supp.V 1981); 516 F.Supp. at 977 n. 17. That finding, necessary to establish a cause of action under section 504, is amply supported by the record.[9] The school board's other suggested errors are likewise refuted by the record.

III. THE STATE BOARD

The district court enjoined the school board and State Board to "modify the Individual Education Program of Amber Tatro to include the provision" of CIC. Upon the motion of the school district, the court's original judgment was amended to hold the State Board jointly and severally liable with the school board for attorneys' fees. The State Board argues that it should not have been included in the injunction and that it is not liable for attorney's fees.

The EAHCA places primary responsibility for development and revision of IEP's upon local school boards. 20 U.S.C. § 1414(a)(5) (1976). The state educational agency, here the State Board, is given supervisory responsibility to assure that local agencies carry out their responsibilities. 20 U.S.C. § 1412(6) (1976). The State Board argues that the district court erred in ordering it to modify Amber's IEP because the EAHCA places that duty on the local school board. The State

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[9] *See Tatro* v. *Texas*, No. CA-3-79-1281-G (N.D. Tex. Sept. 8, 1981) (unpublished memorandum opinion) in which after entry of the judgment below, the district court afforded the school board an opportunity to reopen the record to rebut the school superintendent's concession that the school district received federal assistance for programs from which Amber had been excluded. The record reveals no attempt by the school district to do so.

Board's argument is based on an unduly scholastic reading of the district court's judgment. Although the words of the judgment standing alone perhaps suggest that the State Board should itself engage in the revision of Amber's IEP, the district court's opinion makes clear that the State Board has only been enjoined to act in the supervisory capacity required of it by the EAHCA. 516 F.Supp. at 972 ("Because the State Board of Education has supervisory responsibilities for assuring that Amber is educated in accordance with the EAHCA . . . the members . . . will be retained in their official capacities for the purpose of injunctive relief."). *See Kruelle* v. *New Castle County School District*, 642 F.2d 687, 697 (3d Cir. 1981) (interpreting district court's order to state agency to require only the supervisory action contemplated by the EAHCA); *see also S-1* v. *Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied* 454 U.S. 1030, 102 S.Ct. 566, 70 L.Ed.2d 473 (1981). The State Board need only "assure" that Amber's IEP conforms to the EAHCA as interpreted by this court. 20 U.S.C. § 1412(6) (1976). Given the State Board's prior action preventing administration of CIC in Amber's case, it was within the district court's discretion to enjoin the State Board to fulfill its statutory duty in order to insure complete prospective relief to the plaintiffs.

The State Board's second argument is that even if it was properly enjoined under the EAHCA, the district court did not make a specific finding that it had violated section 504 and that it was therfore improper for the district court to hold it liable for attorneys' fees under the Rehabilitation Act. We have held already that under *Tatro I* the district court properly held that by refusing to provide CIC, the school board denied Amber the benefits of a federally assisted program or activity in violation of section 504. The record established that after the school board's decision not to provide CIC was reversed by an independent hearing officer and the state Commissioner of Education, the State Board acted to reinstate the school board's original decision. *See* Plaintiffs' Exhibit 5a and attachments (Order of the State Board of Education, Sept. 8, 1979). That action, which the State Board does not deny that it took, had

the effect of denying the benefits of a federally funded program to Amber Tatro just as the school board's action had. For the same reasons, the State Board's action violated section 504 and supported an award of attorneys' fees under section 505.[10]

For the reasons we have stated, the judgment of the district court is in all respects AFFIRMED.

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[10] The district court found that an attorneys' fees award against the State Board was not barred by the Eleventh Amendment. *Tatro* v. *Texas*, No. CA-3-79-1281-G (N.D.Tex. Sept. 8, 1981) (unpublished memorandum opinion). The State Board has not appealed that decision; however it has suggested that its action reversing the decisions of the hearing officer and Commissioner of Education was taken in its judicial capacity and is entitled to immunity on that basis. We need not decide whether judicial immunity might bar attorneys' fees awards under § 505, *see Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), because this court has held that the EAHCA denies to state educational agencies the judicial power to review the decisions of an independent hearing officer. *Helms* v. *McDaniel*, 657 F.2d 800, 805-06 & n. 9 (5th Cir. 1981), *cert. denied* 455 U.S. 946, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982). Lacking judicial capacity, the State Board had no judicial immunity.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

NO. 81-1454.

Henri and Mary TATRO, Individually,
and as Next Friend of Amber Tatro, A Minor,
Plaintiffs-Appellees, Cross-Appellants,
v.
The STATE OF TEXAS, *et al.*,
Defendants,

State Board of Education,
Defendant-Appellant,

The Irving Independent School District,
Defendant-Appellant, Cross-Appellee.

Appeal From The United States District Court For The Northern District Of Texas

U.S. COURT OF APPEALS
FILED
JUL 5 1983
GILBERT F. GANUCHEAU
CLERK

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 4/25/83, 5 Cir., 198__, ____ F.2d ____).

(JULY 5, 1983)

Before BROWN, GEE and JOLLY, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ ?????
United State Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-79-1281-G

HENRI and MARY TATRO, *et al.*,

Plaintiffs,

v.

STATE OF TEXAS, *et al.*,

Defendants.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D
MAY 26 1981
JOSEPH McELROY, JR. CLERK
By JOSEPH MEELROY, JR.
Deputy

MEMORANDUM OPINION

Amber Tatro is a 3½ year old female suffering from myelomenengocele, commonly referred to as spina bifida. As a result of this handicap, Amber not only suffers from orthopedic and speech impediments, but also from what is called a neurogenic bladder. Because of the neurogenic bladder condition, she must be "catheterized" approximately every three of four hours each day, the method of choice being Clean Intermittent Catherization ("CIC"). This procedure involes washing a little metal tube, the catheter, inserting the catheter in the bladder to allow the urine to drain out, pulling the catheter out, and then wiping the bladder region. This procedure can be performed by laymen after proper training, but because of the child's age, she is unable to perform CIC upon herself. This suit is rooted in the decision of the Irving Inde-

pendent School District that were Amber to attend its early childhood development program, the school would not provide CIC to Amber during her school day.

Henri and Mary Tatro, individually and as next friend of Amber Tatro, brought this action for injunctive relief and money damages against the State of Texas, the State Board of Education, the Texas Education, the Texas Education Agency, the Board of Trustees for the Irving Independent School District, and J. F. Townley, individually, as Superintendent of the Irving Independent School District. Plaintiffs allege that provision of CIC to Amber is required by the Education of All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, and the stated policy of the Irving Independent School District, *Treatment of Students by School Personnel*, Policy No. 5157. Plaintiffs have applied for a preliminary injunction ordering defendants to provide catheterization for Amber during the pendency of this suit. Defendant Townley filed a motion to dismiss the complaint as against him.

A parent is indeed a "hostage to fate." Caring for a child under the best of circumstances taxes financial and emotional reserves—here, most heavily. Amber's plight tugs at the heartstrings, and given the relative rarity of spina bifida, there is a temptation to here achieve a "humane" result. Despite the limited number of times school boards may be faced with a child requiring CIC, the interpretation of these federal statutes has wide consequences because it involves definitions of the duty of hundreds of school districts to be discharged in myriad factual patterns. The limits on this court's institutional role here gives little play for this court's humanitarian concern for Amber and her parents. This court instead is called on to engage in the relatively emotionally barren task of providing the interstitial stuffing to acts of Congress against a background of its intent and purpose in enactment. Doing so, the court concludes that the application for preliminary injunction must be denied and

the motion to dismiss the complaint as against Townley must be granted.[1]

To assist the states in educating the handicapped, federal grants are made available to them under the Education for All Handicapped Children Act. Grants are conditional on the states establishing "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). *See also, Lora* v. *Board of Education of City of New York*, 456 F.Supp. 1211, 1226 (E.D. N.Y. 1978); 20 U.S.C. §§ 1414(a)(6)-(7). Plaintiffs assert that the Act is to be interpreted in this case as requiring provision of CIC to Andrea. This court disagrees.

Free appropriate public education is statutorily defined as "special education" and "related services" which meet certain requirements. 20 U.S.C. § 1401(18). Plaintiffs assert that the provision of CIC to Amber is a related service. The term "related service" is defined as:

> . . . transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

20 U.S.C. § 1401(17).

Free appropriate public education refers to special education *and related* services which meet various conditions. The services required to be provided must be "related" to the special education. Amber suffers from a physical condition which unfortunately necessitates that she receive CIC every

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[1] While no legal duty is owed by the District and the other defendants, one hopes that they will, out of compassion within the limits of their institutions, attempt to ease the burdens on Amber's parents.

three or four hours. CIC is required whether or not she is attending school. CIC is not any more related to "special education" than other requisite to her existence, such as food or water. Provision of CIC, unlike such listed "relates services" as "special pathology and audiology, psychological services, physical and occupational therapy, [and] recreation," is not directly related to the provision of "special education."

The definition of "related services" has only two categories: (1) transportation as may be required top assist a handicapped child to benefit from special education, and (2) supportive services as may be required to assist a handicapped child to benefit from special education. The transportation provision is not applicable and while it makes possible the continued health of Amber, CIC does not enhance the benefits of a particular form of special education. If CIC be deemed a medical service, it would stillnot be a medical service for "diagnostic and evaluation purposes." CIC is not developmental or corrective.

CIC is supportive of Amber's education in the sense that it is required at sufficiently frequent intervals that her education and CIC must proceed apace. One can argue that read literally, every necessary life support system must be furnished. But the court has found no congressional intent to sweep broadly in its usage of the word "related." Instead the court finds that to be related in the statutory sense the service requirement must arise from the effort to educate. There is a difference between maintenance of life systems and enhancing a handicapped person's ability to learn. The CIC is essential to Amber's life but once that life maintenance service is provided, it is unrelated to her learning skills.

This court has not been presented with any evidence in the legislative hisotry which would indicate that the term "related services" can be construed as broadly as plaintiffs urge. To the contrary, the languge used while evincing a broad purpose carefully limits the means of achieving the. For example, medical services while illustrated by a listing of a variety of services is carefully limited to diagnostic and evaluation purposes. That

qualification is inconsistent with finding a congressional intent to furnish all support services needed by persons during school not because of the schooling but because that care is always required. The notion of related services as being those services that make more beneficial the special education being provided was contained even in the original Senate Bill; the term "related services" was originally defined as:

> . . . transportation, developmental, corrective, and supportive services (specifically including at least speech pathology an audiology, psychological services, counseling services, physical and occupational therapy, and recreation) *necessary* for a handicapped child to *fully benefit from special education*, and including early identification and assessment of handicapping conditions in children and provision of such services to such children.
> . . .

(Emphasis added). S. Rep. No. 168, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Adm. News 1424, 1466.

Plaintiffs point to regulations implementing 20 U.S.C. § 1401(17) which include among "related services," "school health services." The regulation in turn define the latter as "services provided by a qualified school nurse or other qualified person . . .," 45 C.F.R. § 121a.13(b)(10) (1978). Because CIC's can be performed by nurses, plaintiffs argue it is a permissible "school health service."

But the statute does not require provision of CIC, and the implementing regulation obviously can only implement duty; it cannot create duty. Nevertheless, we examine this argument to correct a possible misinterpretation of these delphic regulations. Though § 121a.13(10) on its face purports to define "school health services," looking at it closely should make it clear that it is not a complete definition. After all, "services provided by a qualified school nurse or other qualified person" covers an enormous array of services having nothing to do with the education of handicapped children. Section 121a.13(a) of the regulations defines "related services" as:

> . . . transportation and such developmental, corrective, and other supportive services as are required to assist a

> handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

The most logical interpretation of the regulations is that "school health services" mean those services which not only meet the requirements of § 121a.13(b)(10) but also are "related services" as defined in the first sentence of § 121a.13(a). The definition in the statute. It follows that provision of CIC cannot be a "related service" by the terms of the regulations. And thus provision of CIC here is not a "school health service."

Plaintiffs also allege violation of the Rehabilitation Act of 1973, specifically, 29 U.S.C. § 794. Section 794 provides in part:

> No otherwise qualified handicapped individual in the United States, as defined in section 707(7) of the title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Plaintiffs allege that defendants, in refusing to provide CIC to Amber, are effectively denying Amber the benefits of, and effectively excluding Amber from a federally-funded program and so are violating § 794.

The court finds otherwise even assuming that plaintiffs have a right of action under this Act. Here the defendants are merely refusing to affirmatively provide catheterization. The Rehabilitation Act cannot be interpreted as requiring a school to furnish catheterization that Amber would need regardless whether she is taking advantage of any educational programs or not. Plaintiffs assert that local defendants with the agreement of state defendants "have refused to provide

[catheterization]. No alternative was given to Amber's parents other than for one of them to attend to Amber's needs during the school day." Brief for Plaintiffs at 10. The latter half of this assertion is ambiguous. In light of the complaint, the plaintiffs' brief taken as a whole, plaintiffs' proposed stipulation of facts, and a conference held in chambers, the most reasonable interpretation of that assertion is that Amber's participation in the program is conditioned on either her parents or her parents' agents providing catheterization. This is simply the corollary to the decision to not provide CIC to Amber, and is permissible under the Rehabilitation Act. Plaintiffs cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up governmental health care for people seeking to participate in such programs.

Analysis of the regulations which implement both the Rehabilitation Act and the Education Act leads to the same conclusion. Section 84.33 of Title 45 of the Code of Federal Regulations requires certain provision of free appropriate public education. The definition of appropriate public education is analogous to that definition in the Education Act, appropriate education here being composed of "regular or special education" and *related* "aids and services." 45 C.F.R. § 84.33(b) (1978). The relatedness requirement would prevent provision of CIC here as well. In addition, plaintiffs cannot rely on a requirement that defendants provide "nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." 45 C.F.R. § 84.37(a)(1) (1978). Though nonacademic and extracurricular services and activities may include health services, the connection between provision of CIC and an equal opportunity to participate in nonacademic and extracurricular services is far from clear to this court.

Plaintiffs also argue that provision of CIC by the Irving Independent School District would be the provision of a life-saving service, already authorized by its policy number 5157,

Treatment of Students By School Personnel. Section B of the policy states:

> B. Hypodermic injections may be given at school, but *only* on an emergency (life saving) basis. For example: for individuals who are highly allergic to insect bites, diabetes or other conditions this shall be done under the following conditions: . . . .

The use of the word "emergency" would preclude regular CIC "injections." Moreover, catheterizations are not "injections."

Defendant Townley's motion to dismiss as to him is granted and plaintiffs' motion for a preliminary injunction is DENIED.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.
Sept. 2, 1980.

No. 81-1069.

Henri and Mary TATRO, *et al.*,
Plaintiffs-Appellants,

v.

The STATE OF TEXAS, *et al.*,
Defendants-Appellees.

Parents of child with neurogenic bladder condition caused by myelomeningocele brought action against school district for alleged violation of Education for All Handicapped Children Act of 1975 and Rehabilitation Act of 1973 arising from failure to include scheduling of clean instrument catheterization in the child's individual education plan. The United States District Court for the Northern District of Texas, Patrick E. Higginbotham, J., 481 F.Supp. 1224, entered judgment denying parents' motion or preliminary injunction, and appeal was taken. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) clean instrument catheterization necessary for the child to be able to be present in classroom at all was "supportive service" required to assist handicapped child to benefits from special education for purposes of Education for All Handicapped Children Act of 1975, and thus clean instrument catheterization was "related service" for purposes of provision of the Act mandating that recipients of federal funds must assure all handicapped children right to special education and related services, and (2) failure to include in individualized education plan devised for the child schedule of clean instrument catheterization violated provision of Rehabilitation Act of 1973 mandating that no otherwise qualified handicapped individual shall be excluded from participation in or be subjected to

discrimination under any program or activity receiving federal financial assistance by reason of his handicap.

Vacated and remanded.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, TATE, and SAM D. JOHNSON, Circuit Judges.

GOLDBERG, Circuit Judge:

Amber Tatro is a four-year-old child who suffers from myelomeningocele, a birth defect commonly known as spina bifida.[1]

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[1] We caution that we recite the "facts" here only to place the case in context and that we really have no facts to speak of. Following a conference between the parties and the district court, the court invited stipulated facts. Plaintiffs submitted their proposed stipulation; defendants failed to respond. Instead of compelling such a response or making its own findings, the district court issued a memorandum opinion denying plaintiffs' motion for a preliminary injunction. Thus, we have no findings upon which to rely for our review.

Obviously, the preferable course would have been for the district court to find facts so that its disposition of plaintiffs' motion would be more fully amenable to appellate review. Nevertheless, we are not powerless on this appeal. Since the district court's denial of plaintiffs' motion for a preliminary injunction rested on its legal interpretation of the Acts under consideration, we can review the district court's legal conclusion. Furthermore, in order to provide meaningful guidance to the district court for its consideration of plaintiffs' motion on remand, we shall assume that the facts, which we detail in this opinion and base on plaintiffs' proposal, are true. On remand, of course, the district court should make the appropriate findings. If the district court finds the facts to be different from those we state, it must then determine whether these factual deviations are material so as to alter the conclusion we reach.

Additionally, since the district court denied plaintiffs' motion on the ground that there was no likelihood of success on the merits, we shall discuss only that factor for a preliminary injunction. On remand,

As a result of this congenital defect, Amber suffers from orthopedic and speech handicaps and from a neurogenic bladder. This latter condition prevents Amber from being able to empty her bladder voluntarily. As a result, Amber must be catheterized every three to four hours in order to function normally without the danger of developing chronic kidney infection.

In 1979, Amber became eligible for participation in the early childhood development program provided by defendant Irving Independent School District ("the school district"). After a series of meetings with Amber's mother, the school district's Admission, Review and Dismissal Committee developed an Individualized Education Plan ("IEP") for Amber as required by the Education for All Handicapped Children Act of 1975 ("the EAHCA"), 20 U.S.C. § 1414(a)(5).[2] The IEP stipulates

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the district court should consider the other relevant criteria, to-wit, the irreparable harm to plaintiffs from failure to issue the injunction, the harm to the defendant from issuance of the injunction, and the public interest. *See Canal Authority* v. *Callaway*, 489 F.2d 567 (5th Cir. 1974). For its consideration of these factors, we direct the district court's particular attention to our recent decision in *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980).

[2] 20 U.S.C.A. § 1414(a)(5) (West 1978), provides the following:

> (a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—
>
> (5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually.

An individualized education program is defined as

> a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to

that physical and speech therapy is to be provided to Amber. However, the IEP fails to specify the provicion of any services to Amber that may be necessary due to her neurogenic bladder. More particularly, the IEP fails to specify that Clean Intermittent Chatheterization (CIC) will be administered to Amber during the school day.[3]

Following the fruitless pursuit of the state remedies required by the EAHCA,[4] Amber's parents, plaintiffs, sued in

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meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Id. § 1401(19).

[3] CIC is a very simple procedure which can be performed within five minutes. The catheter is washed with soap and water; the urethral area is wiped clear.; the catheter is introduced approximately one and one-half inches into the urethra and the bladder contents drained; the catheter is withdrawn; and the amount of urine collected is measured and noted. The procedure can be taught to anyone after a training session of approximately thirty minutes, and it need not be performed by a doctor or nurse. Currently, Amber is catheterized at home by her parents, teenage sibling, and babysitter. However, when Amber is eight or nine years-old, she will be able to perform CIC upon herself.

[4] These procedures are detailed in 20 U.S.C.A. § 1415(a)(c) (West 1978):

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with

respect to the provision of free appropriate public education by such agencies and units.

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian.

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to

district court in accordance with 20 U.S.C. § 1415(c)(2).[5] They contend that because the IEP contains no provision for CIC, the school district has violated the EAHCA, 20 U.S.C. § 1412(1), by failing to provide a free appropriate public education to Amber.[6] They also contend that the school district has

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the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

[5] 20 U.S.C.A. § 1415(e)(2)(West 1978) provides the following:

> Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

[6] 20 U.S.C.A. § 1412(1) (West 1978) provides that "[i]n order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met: (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education."

Free appropriate public education is defined as

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Id. § 1401(18).

Free appropriate public education thus includes special education and related services. The Act defines special education as "specially designed instruction, at no cost to parents or guar-

violated section 504 of the Rehabilitation Act of 1973, ("section 504"), *as amended*, 29 U.S.C. § 794.[7] The case reaches us from the district court's denial of plaintiffs' motion for a preliminary injunction to require the school district to provide CIC.[8] For the reasons detailed below, we vacate and remand.

I. The EAHCA

The Education for All Handicapped Children Act of 1975, 89 Stat. 773 (1975), was sparked by an "[i]ncreased awareness of the educational needs of handicapped children and landmark

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dians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." *Id.* § 1401(16). Related services are defined as follows:

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

Id. § 1401(17).

[7] Section 504 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C.A. § 794 (West Supp. 1980), in pertinent part, provides the following:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[8] In its opinion denying plaintiffs' motion for a preliminary injunction, the district court also granted the motion to dismiss for lack of personal jurisdiction of defendant Townley, Superintendent of the Irving Independent School District. This ruling is not before us on this appeal.

> In addition, defendants raise multifarious arguments attacking the sufficiency of plaintiffs' complaint. These issues are not before us and should be handled on remand.

court decisions establishing the right to education for handicapped children . . .." S.Rep. No. 168, 94th Cong., 1st Sess. 5, *reprinted in* [1975] U.S.Code Cong. & Admin. News, pp. 1425, 1429. The Congress found that handicapped children were receiving inadequate services, were not being properly identified and evaluated, and were being subjected to unnecessary exclusion from the regular educational environment.[9] To reme-

[9] The congressional findings are contained in section 3(a) of the EAHCA:

> The Congress finds that—
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> (1) there are more than eight million handicapped children in the United States today;
>
> (2) the special educational needs of such children are not being fully met;
>
> (3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
>
> (4) one million of handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;
>
> (5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;
>
> (6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;
>
> (7) developments in the training of teachers in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;
>
> (8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and
>
> (9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

20 U.S.C.A. § 1401 (West 1978) (historical note).

dy this situation, Congress increased educational grants to participating states to enable them to meet the unique needs of handicapped children, *see id.* at 7-9, [1975] U.S.Code Cong. & Admin. News at 1431-33, strengthened procedures to enable parents of handicapped children to advocate more forcefully the rights of their handicapped children, *see id.* at 9, [1975] U.S.Code Cong. & Admin. News at 1433, adopted judicially imposed due process requirements that ensure the proper identification and evaluation of handicapped children, *see id.* at 26-30, [1975] U.S.Code Cong. & Admin. News at 1450-52, and stipulated that handicapped children were to be integrated into the regular classrooms to the maximun extent appropriate. *See id.* at 33-34, [1975] U.S.Code Cong. & Admin. News at 1457-58; S.Conf.Rep. No. 455, 94th cong., 1st Sess. 30, *reprinted in* [1975] U.S.Code Cong. & Admin. News, pp. 1480, 1483. In reference to the last objective, the Report stated:

> The Conferees point out that while instruction may take place in such locations as classrooms, the child's home, or hospitals and institutions, the delivery of such instruction must take place in a manner consistent with the requirements of law which provide that to the maximum extent appropriate handicapped children must be educated with children who are not handicapped, and that handicapped children should be placed in special classed, separate schooling, or any other educational environment only when the nature or severity of the handicap is such that education in regualr classes with the use of supplementary aids and supportive services cannot be achieved satisfactorily.

Id.

To ensure the provision of proper services, Congress mandated that recipients of federal funds must assure "all handicapped children the right to a free appropriate public education," 20 U.S.C.A. § 1412(1)(West 1978), which consists of special education and related services. *See id.* § 1401(18).[10] The

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[10] The definitions of the terms "free appropriate public education," "special education," and "related services," are reprinted at note 6 *supra*.

battle lines in this case havve been drawn on the issue whether the provision of CIC to Amber, a handicapped child within the meaning of the EAHCA, *see id.* § 1401(1),[11] is a related service.

The district court held that CIC is not. It observied that there are only two categories of related services: (1) transportation required to assist a handicapped child to benefit from special education, and (2) developmental, corrective, and supportive services necessary to assist a handicapped to benefit from special education. It properly concluded that CIC is not transportation and that CIC is neither developmental nor corrective. The district court noted that "CIC is supportive of Amber's education in the sense that it is required at sufficiently frequent intervals that her education and CIC must proceed apace," and that "[o]ne can argue that read literally, every necessary life support system must be furnished." Nevertheless, the district court concluded that there was "no congressional intent to sweep broadly in its usage of the word 'related.' " The court thus held that "to be related in the statutory sense the service requirement must arise from the effort to educate. There is a difference between maintenance of life systems and enhancing a handicapped person's ability to learn. The CIC is essential to Amber's life but once that life maintenance service is provided, it is unrelated to her learning skills."

The district court further observed that the regulations implementing the EAHCA[12] construe related services to in-

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[11] 20 U.S.C.A., § 1401(1) (West 1978) provides the following:

> The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

[12] These regulations are contained at 45 C.F.R. part 121a (1979). They were drafted by the Office of Education of the former Department of Health, Education and Welfare whose functions have since been transferred to the newly-created Department of Education. *See* Pub.L.No. 96-88 § 601, 93 Stat. 696 (October 17, 1979).

clude "school health services,"[13] which are defined as "services provided by a qualified school nurse or other qualified person." 45 C.F.R. § 121a.13(b)(10)(1979). Despite the fact that CIC comports with this defintion of school health services, to be a class of related services, must, like all categories of related services, arise from the effort to educate in order to fit within the statutory definition. Hence, CIC did not fit the bill. We find that the district court erred.

As the district court correctly observed, CIC falls within a literal interpretation of the statutory definition of the related services. Quite simply put, without the provision of CIC, Amber cannot benefit from the special education to which she is entitled, for, without CIC, she cannot be present in the classroom at all. Thus, CIC is a supportive service required to assist Amber to benefit from her special education.

Nevertheless, the district court felt compelled to limit the literal words of 20 U.S.C. § 1401(17) because it perceived a need to circumscribe the scope of related services lest "every necessary life support system . . . be furnished." This perception, however, ignored the fact that the EAHCA contains its own limitations on the type of life support services that must be provided as related services. First, in order to be entitled to any related services at all, a child must be handicapped so as to require special education. 45 C.F.R. § 121a.14(1979)(comment one); *see* 20 U.S.C.A. § 1401(1) (reprinted at note *supra*).

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[13] 45 C.F.R. § 121a.13(a) (1979) provides the following:

> As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

Second, the life support service must be necessary to aid a handicapped child to benefit from the special education to be provided. *see id.* § 1401(17). Thus, a life support service would not be a related service if it did not have to be provided during shcool hours, but instead could be performed at some other time.[14] Third, in order to be a related service, the life support service must be one which a nurse or other qualified person can perform. 45 C.F.R. § 121a.13(b)(10) (1979). Excluded from the term "related services" are those health-related activities which must be performed by a licensed physician that are not provided "to determine a child's medically related handicapping condition which results in the child's need for special education and related services." *Id.* § 121a.13(4).[15] Thus, even under a literal interpretation of the statutory definition, the types of life support services needed by a child which can be related services are limited.

Moreover, the district court's deviation from the literal words of the statute ignored a mandate contained in the EAHCA which is additional to the congressional requirement that states furnish each handicapped child a free appropriate public education consisting of special education and related

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[14] For example, suppose that a child required an insulin injection once a day to maintain his life. Since the injection could be administered at night after school, it would not be a supportive service required to assist the child to benefit from special education. Thus, it would not be a related service.

[15] The exclusion of medical services not performed for diagnostic and evaluation purposes derives from the definition of related services. *See* 20 U.S.C.A. § 1401(17) (West 1978). Given this exclusion, HEW quite properly eliminated such health-related services from the definition of related services contained in the regulations. Concomitantly, since there is no blanket exclusion from supportive services for all health-related services, the inclusion of health-related services that are not performed by a physician and are "required to assist a handicapped child to benefit from special education," *id.*, is quite proper.

services. The language of 20 U.S.C.A. § 1412(5) (West 1978) is quite unequivocal:[16]

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (5) The State has established . . . Procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regualr classes with the use of supplementary aids and services cannot be achieved satisfactorily . . ..

Construing the term "related services" to exclude services like CIC, necessary to keep a handicapped child in the classroom, would completely eviscerate this mandate. This we cannot do. In light of this categorical congressional judgment that handicapped children should be educated in the regular classrooms to the maximum extent appropriate, and given the existence of limitations in the statute which circumscribe the types of life support systems which must be provided as related services,

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[16] Equally categorical is 20 U.S.C.A. § 1414(a)(1)(C)(iv) (West 1978):

> A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—
>
> (1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—
>
> (C) establish a goal of providing full educational opportunities to all handicapped children, including—
>
> (iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs . . . .

we hold that the words "supportive services . . . as may be required to assist a handicapped child to benefit from special education" must be read literally to include the provision of CIC to Amber Tatro.[17]

II. SECTION 504

The district court gave plaintiff's claim under section 504 of the Rehabilitation Act of 1973[18] rather short shrift. the gravamen of its holding is that section 504 does not require the school district to provide CIC to Amber because "[p]laintiffs cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up of governmental health care for people seeking to participate in such programs." This conclusion is incorrect.

In *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980), plaintiff, a deaf graduate student at the University of Texas, brought suit against the University because of its refusal to provide him wih sign language interpreter services, an aid which he claimed was necessary for his participation in the University's programs. We affirmed the district court's grant of a preliminary injunction requiring the University to provide interpreter services. We held that the failure to provide interpreter services amounted to the exclusion of plaintiff from

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[17] Our holding that these words should be read literally, subject only to the limitations, contained in the statute, which we have discussed, is supported by the statute's enumeration of physical and occupational therapy, and recreation as examples of related services. *See* 20 U.S.C.A. § 1401(17) (West 1978). We fail to see how these services "arise from the effort to educate" any more than CIC.

In view of our holding that CIC is a related service, we need not address the issue whether 20 U.S.C.A. § 1414(a)(1)(C)(iv) (West 1978), by its use of the term "supplementary aids and services," contemplates the provision of services additional to "related services."

[18] Section 504 is reproduced at note 7 *supra*.

the University's programs and hence violated section 504. *See id.* at 133.

Analogously, Amber has been excluded from the school district's programs by the district's programs by the district's refusal to provide CIC to Amber, she will be unable to participate in the preschool programs of the school district. Such exclusion is expressly condemned by section 504.

Defendants contend that *Southeastern Community College* v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), dictates the contrary result. This assertion is incorrect. As we observed in *Camenisch, supra*, "the Supreme Court's decision in *Southeastern Community College* says only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefits of the training." *Id.* at 133. Thus, like *Camenisch*, this case is distinguishable from *Southeastern Community College* because, with the provision of CIC, Amber will be able to perform well in school and thus realize the principal benefits of the school district's program.[19] The school district's failure to provide CIC threfore violates section 504.

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[19] We by no means intend to intimate that every type of service, necessary to prevent the exclusion of an otherwise qualified handicapped person from a program, must be provided. First, section 504 does not require "substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals . . . ." *Southeastern Community College, supra*, 99 S.Ct. at 2369. Thus, the College was not required to eliminate certain required courses or to provide individual supervision by faculty members whenever respondent, a deaf nursing student, would attend patients directly. *See id.*, 99 S.Ct. at 2368. This result obtained because "[w]hatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives." *Id.*, 99 S.Ct. at 2369. In contrast, like the plaintiff in *Camenisch, supra*, who will receive the principal benefits of the University's program once a

VACATED and REMANDED for proceedings not inconsistent with this opinion.

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deaf interpreter is provided, Amber will realize the principal benefits of the school district's program once CIC is provided.

Second, *Southeastern Community College* possibly indicates that section 504 does not require the provision of services that would impose "undue financial and administrative burdens" upon the recipient. *See Southeastern Community College, supra*, 99 S.Ct. at 2370. Thus, for example, section 504 may not require the school district to provide a very expensive procedure like kidney dialysis to a child who needs such a service during the school day. However, CIC does not appear to approach an undue financial and administrative burden. It can be performed in five minutes by anyone who has received thirty minutes of training. This burden appears to be a far cry from being "undue." Of course, since we have no findings upon which to rely, *see* note 1 *supra*, we leave this determination to the district court.

STATUTES

20 U.S.C. § 1401 - EDUCATION - CH.33

§ 1401. Definitions

As used in this chapter—

* * *

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

* * *

§ 1415. Procedural Safeguards

* * *

Civil Action; Jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent

jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

* * *

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub.L. 91-230, Title BI, § 615, as added Pub.L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788.

* * *

29 U.S.C. § 701 Et Seq.

§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submite to such committees.

(As amended Pub.L. 95-602, Title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987.)

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-16], including the application of sections 706(f) through 706(k) [42 U.S.C.A. § 2000e-5(f) through (k)], shall be available, with respect to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [42 U.S.C.A. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub.L. 93-112, Title V, § 505, as added Pub.L. 95-602, Title I, § 120, Nov. 6, 1978, 92 Stat. 2982.)

* * *

Article 4495b, Tex.Rev.Civ.Stat.Ann (Vernon Supp. 1982-83)

Medical Practice Act

* * *

§ 3.06. Construction

* * *

(d) This Act shall be so construed that:

(1) a person licensed to practice medicine shall have the authority to delegate to any qualified and properrly trained person or persons acting under the physician's supervision any medical act which a reasonable and prudent physician would find is within the scope of sound medical judgment to delegate if, in the opinion of the delegating physician, the act can be properly and safely performed by the person to whom the medical act is delegated and the act is performed in its customary manner, not in violation of any other statute, and the person does not hold himself out to the public as being authorized to practice medicine. The delegating physician shall remain responsible for the medical acts of the person performing the delegated medical acts. The board may determine whether or not an act constitutes the practice of medicine, not inconsistent with this Act, and may determine whether any medical act may or may not be properly or safely delegated by physicians; . . . .

* * *